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No. 558

In the Supreme Court of the United States

OCTOBER TERM, 1948

FEDERAL POWER COMMISSION, PETITIONER

PANHANDLE EASTERN PIPE LINE COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

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PANHANDLE EASTERN PIPE LINE COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

The Solicitor General, on behalf of the Federal Power Commission, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on January 6, 1949.

OPINIONS BELOW

The findings of fact, conclusions of law and opinion of the United States District Court for the District of Delaware appear in the Record at pages 49-50, 60-66. The opinion of the United States Court of Appeals for the Third Circuit (R. 74-81) is not yet officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 6, 1949 (R. 81). The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act (52 Stat. 821, as amended by 36 Stat. 83, 15 U. S. C. 717 *et seq.*) are set forth in the Appendix, *infra*, pp. 26-34.

QUESTIONS PRESENTED

The Federal Power Commission instituted an investigation, pursuant to Section 14 of the Natural Gas Act, to inquire into the circumstances surrounding the proposed disposition of gas reserves owned by respondent Panhandle, a natural gas company subject to the Commission's jurisdiction under the Act. The investigation was for the purpose of determining whether the Commission had jurisdiction with respect to the proposed disposition and, if so, whether any Commission action was required. The Commission ordered that the *status quo* be maintained pending the outcome of its investigation, but Panhandle refused to comply with this order. Upon the Commission's application to a District Court for an injunction to maintain the *status quo* pending the outcome of its investigation, the court withheld such aid from the Commission on the basis of its independent determination that the Commission had no jurisdiction in the premises; the court did not limit itself, as the Commis-

sion urged, merely to an inquiry whether there is a reasonable basis in the Natural Gas Act to support such jurisdiction, thus permitting the Commission in the first instance to investigate all the facts in order to ascertain whether the proposed disposition had any aspects which might bring it within the Commission's jurisdiction.

The principal question presented is whether the courts below were correct in withholding the interlocutory relief sought by the Commission. A further question which may be reached, on the assumption that it was necessary for the court to satisfy itself at the present stage of the proceedings that the Commission had jurisdiction, is whether the Commission does have jurisdiction with respect to a natural gas company's disposition of its reserves.¹

¹ The court below went beyond the question of whether there is a reasonable basis for Commission jurisdiction and held that the Commission does not have jurisdiction in any circumstances over a natural gas company's disposition of its gas reserves. The Commission believes that the court below improperly reached that question, for the investigation pending before the Commission in aid of which the Commission is here seeking judicial assistance was instituted for the purpose, among others, of inquiring into and passing on that question. Accordingly, the Commission is very reluctant to prejudge the result of its investigation and to take a position on this question in this Court. However, in order to avoid precluding itself from presenting argument on that question if this Court should determine that that question is here reached, the Commission is prepared to urge that at least the disposition of some gas reserves by natural gas companies is subject to its jurisdiction under the Natural Gas Act. Whether Panhandle's disposition of the reserves here involved is subject to this jurisdiction depends on the facts and evidence developed in the course of the investigation pending before the Commission.

STATEMENT

Respondent, Panhandle Eastern Pipe Line Company (Panhandle), is a "natural-gas company" subject to the Federal Power Commission's jurisdiction under the National Gas Act. It owns and operates an integrated natural gas pipeline system originating in the Hugoton and Panhandle natural gas fields of Kansas, Oklahoma and Texas and extending across the states of Oklahoma, Kansas, Missouri, Illinois, Indiana and Ohio and into the State of Michigan (R. 3-4). It supplies natural gas to distributing companies along the route of its pipelines serving more than 1,500,000 customers. These distributing companies have supply contracts with Panhandle which are filed with the Commission as rate schedules (R. 4).

Prior to October, 1948, Panhandle owned, as part of its pipeline system, substantial gas reserves, including approximately 96,000 acres of gas leases which were located in the Kansas portion of the Hugoton gas field and contained an estimated 700 billion cubic feet of gas (R. 4). In 1942, most of these 96,000 acres of reserves, although not used, were, on the basis of Panhandle's representations that they were "used and useful property," included by the Commission in fixing Panhandle's rate base, and delay/rentals, renewal bonus payments and all other exploration and development costs relating to these leases were similarly allowed as revenue deductions. (*City of Detroit v. Panhandle Eastern Pipe Line Co., In the Matter of*

Panhandle Eastern Pipe Line Co., F. P. C. Dockets, G-200, G-207; 3 F. P. C. 273, affirmed 143 F. 2d 488 (C. A. 8), 324 U. S. 635). To date, more than \$665,000 has been so deducted (R. 7, 12). In addition, in applications filed in 1946 and thereafter, pursuant to Section 7 of the Act, as amended (Appendix, *infra*, pp. 27-30), for certificates of public convenience and necessity to construct and operate its so-called "Group A and B facilities," and "Group C" facilities (F. P. C. Dockets G-706, G-876, respectively),² Panhandle included most of these 96,000 acres (all but 25,000 acres in G-706; all but 1,640 acres in G-876) among the gas reserves held or controlled by it, and represented that these reserves were adequate to justify the issuance of the certificates³ (R. 12-14). On the basis of these representations, the Commission, finding *inter alia* that Panhandle's gas supply was adequate to meet the requirements of the service to be rendered by means of the proposed facilities, issued the requested certificates (R. 13-14). 5 F. P. C. 544, 546; 949, 952 (F. P. C. Docket G-706, orders of June 4, 1946, and

² These facilities, the cost of which was estimated at about \$57,000,000, were designed to augment service to existing customers on Panhandle's system (R. 7).

³ Section 57.5 of the Commission's Order No. 99, amending its Provisional Rules of Practice and Regulation under the National Gas Act (7 Fed. Reg. 6844) provides:

Applications for certificates of public convenience and necessity * * * shall set forth * * * the following * * *

(f) A statement of the gas reserves which are to supply the market which is proposed to be served * * *

of November 30, 1946); F. P. C. Docket G-876, Order of June 10, 1948.

On September 22, 1948, Panhandle caused the creation of Hugoton Production Company (Hugoton), a Delaware corporation (R. 4, 61), the officers, directors and offices (other than the statutory office in Delaware) of which are the same as those of Panhandle (R. 5). On October 11, 1948, pursuant to the agreement of the same day, Panhandle transferred to Hugoton its right, title and interest in the 96,000 acres of gas reserves in return for all of Hugoton's 810,000 shares of stock (R. 4-5, 61).⁴ Hugoton agreed promptly to proceed to develop this acreage and to attempt to negotiate sales of the gas to purchasers other than Panhandle (R. 4).⁵ Panhandle, however, retained an option to purchase on and after January 1, 1965, at the going market price, all or any specified portion of the gas produced from these reserves, which, the agreement contemplated, would still contain 400 billion of the 700 billion cubic feet of gas now estimated to be there contained (R. 4-5, 27, 61).

On the same day, Panhandle's Board of Directors declared a dividend of $\frac{1}{2}$ share of Hugoton

⁴Panhandle also paid Hugoton \$675,000 in cash and transferred some small additional oil acreage not here relevant (R. 4, 5, 61).

⁵Hugoton, on October 18, 1948, contracted to sell gas from these reserves to the Kansas Power and Light Company. The contract provided that all volumes of natural gas covered thereby are to be produced from wells located in the State of Kansas and Kansas Power and Light Company agrees that said gas is to be consumed by it or sold by it for consumption wholly within said State of Kansas (R. 27, 61).

stock for each share of its outstanding 1,620,000 shares of common stock payable on November 17, 1948, to stockholders of record at the close of business on October 29, 1948 (R. 5, 29-30, 62-63). Panhandle's stockholders were advised of this action by letter dated October 11 (R. 25, 31-32); following which the Hugoton stock was traded "over-the-counter" on a "when, as and if basis" (R. 26, 63). On October 29, Panhandle delivered to Hugoton's transfer agent, stock certificate No. 1 for 810,000 shares of Hugoton common stock registered in Panhandle's name and assigned in blank for transfer to Panhandle's stockholders of record on that day, (R. 25-26, 63). By November 13, the date on which the Commission filed its complaint in the District Court and secured an *ex parte* restraining order (see *infra*, p. 8), the transfer agent had prepared stock and scrip certificates registered in the names of Panhandle's stockholders entitled thereto, and inserted these certificates in envelopes to be mailed on November 15 and 16 (R. 26).

Meanwhile, by order dated October 26, 1948, the Commission instituted an investigation, pursuant to Section 14 of the Act, Appendix, *infra*, pp. 30-31, "of the facts and circumstances involved in the formation and proposed operation of the Hugoton Production Company and the transfer to said company by Panhandle * * *" (R. 11, 63). By supplementary order dated November 10, 1948, the Commission, in addition to fixing a date for hearing

on its investigation, ordered Panhandle and Hugoton to show cause why they should not be directed to cancel the contract of October 11, and to refrain from again transferring these gas reserves without the Commission's consent and from paying the Hugoton stock as a dividend, or otherwise transferring it (R. 6, 11-18). The Commission also ordered that the *status quo* be maintained pending final determination (R. 6, 17). Panhandle was advised of the order by telegram and directed to notify the Commission by November 12 that it would comply with the restraint ordered (R. 7). Panhandle failed and refused to do so (R. 7).

On November 13, the Commission filed a complaint in the United States District Court for the District of Delaware seeking an injunction against Panhandle to restrain it from proceeding further in the stock distribution, and to maintain the *status quo* pending final determination by the Commission of the questions presented at the hearing before it (R. 1-18). An *ex parte* restraining order was granted (R. 21-23). The District Court thereafter, however, refused to grant a preliminary injunction on the ground that the Commission's complaint and the affidavits filed by it and by Panhandle (R. 20-21, 24-37) "do not show any basis for the relief sought by [the Commission]" (R. 49, 66).⁶ On appeal, the court below affirmed (R. 74-81).⁷

⁶ The district court permitted the intervention as defendants of several of Panhandle's stockholders (R. 64-65).

⁷ The State Corporation Commission of the State of Kansas was permitted to intervene in the court below (R. 74).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that a federal court shall, in the first instance, independently determine the scope of the jurisdiction of a federal administrative agency when the latter seeks injunctive assistance to maintain the *status quo* pending the outcome of an investigation instituted by such agency.

2. In holding that the facts of this case do not call for the exercise of the court's equitable powers to maintain the *status quo* pending the outcome of the Commission's inquiry.

3. In failing to hold that there is a reasonable basis in the Natural Gas Act for Commission jurisdiction over a natural gas company's disposition of its gas reserves.

4. In holding that under the Natural Gas Act the Commission has no jurisdiction in any circumstances over a natural gas company's disposition of its gas reserves.

5. In affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

In this case, the Federal Power Commission, upon instituting its investigation into whether Panhandle's proposed disposition of a portion of its gas reserves to Hugoton violated the Natural Gas Act or Commission orders issued thereunder or required Commission action of some sort, sought judicial aid in maintaining the *status quo* pending

the outcome of its investigation. The refusal of the court below so to aid the Commission, was based, not on a lack of power (R. 80)⁸ or on countervailing equitable considerations (R. 80),⁹ but on the ground that the Commission had failed to present adequate reasons for obtaining such assistance (R. 78, 80). The Court held that the Commission, as any other litigant, had to show that it had "been given rights or powers for which Court sanction is now sought" (R. 78); that since the Commission, not the private litigant, was seeking judicial aid, the established principle that the administrative agency is, in the first instance, its own judge of the scope of its statutory jurisdiction, was inapplicable (R. 77-78); and, further, that in any case the Commission is without jurisdiction over the proposed transfer (R. 79-80).

In so holding, the court below has determined substantial and important questions of federal law, which affect the functioning of the Federal Power Commission and other federal administrative

⁸ The question as to the power of a federal court so to assist an administrative agency was raised in *SEC v. Long Island Lighting Co.*, No. 1059, Oct. Term, 1944, and in *West India Fruit & Steamship Co. v. Seatrain Lines*, No. 482, this Term. In the *Long Island* case, certiorari was granted (324 U. S. 837), but upon the cause's becoming moot, this Court ordered the judgment vacated and the complaint dismissed, 325 U. S. 833. The petition for writ of certiorari in the *West India* case (170 F. 2d 775, (C. A. 2)) was dismissed on petitioner's motion. Journal of this Court, Oct. Term, 1948, p. 141 (February 7, 1949).

⁹ The court below expressly rejected the contention of Panhandle's stockholders, who had intervened, that the transaction was a thing done, and that there was nothing a court could do to stop it (R. 80).

bodies. The court's refusal to permit the Commission in the first instance to determine its statutory jurisdiction, and to maintain the *status quo* pending such determination, involves the basic relationship between the federal courts and federal administrative agencies and is in conflict with the ruling of the Court of Appeals for the Second Circuit in *West India Fruit & Steamship Co. v. Seatrain Lines*, 170 F. 2d 775 (C. A. 2): Moreover, by improperly prejudging the Commission's jurisdiction and holding that the Natural Gas Act does not vest in the Commission any jurisdiction over a natural gas company's disposition of its gas reserves, regardless of the facts or the effects of such disposition, the court below opens the way to further circumvention and frustration of the Commission's regulatory jurisdiction and to rate increases aggregating several millions of dollars per year. For these compelling reasons, we submit review of this decision below is warranted.

1. The court below correctly proceeded from the premise that a federal court had power to assist an administrative agency to function effectively by maintaining the *status quo* pending the outcome of the agency's investigation into possible statutory violations (R. 80). The granting of interlocutory relief by a court to preserve the *status quo* pending the determination of a controversy before it or another tribunal has been a traditional form of equitable relief. *United States v. United Mine*

Workers, 330 U. S. 258; *Babbitt v. Dutcher*, 216 U. S. 102; *Continental Illinois N. B. & T. Co. v. Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648, 675-676; *Graselli Chemical Co. v. Actua Explosives Co.*, 252 Fed. 456 (C.A. 2); *Northern Pacific Ry. v. Soderberg*, 86 Fed. 49 (C.C.D. Wash.). With the creation of administrative agencies charged with the protection of public interests and standing to protect these interests in court, the courts similarly may assist administrative agencies. *Securities & Exchange Commission v. U. S. Realty & Improvement Co.*, 310 U.S. 434; *West India Fruit & Steamship Co. v. Seatrain Lines*, *supra*, fn. 8, p. 10; *Isbrandtsen Steamship Co. v. United States*, 5 Pike & Fischer, Administrative Law, 81a. 22-37 (S.D.N.Y., December 20, 1948). This follows, since the normal powers of the courts are available in order that these agencies be able to function effectively in carrying out congressional policies. For, as this Court has often admonished, the federal courts are not to treat an administrative agency as an "alien intruder, to be tolerated if must be, but never to be encouraged or aided." *United States v. Morgan*, 307 U.S. 183, 191. In *Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 316 U.S. 4, this Court in dealing with a related question, sustained the implied and inherent power of reviewing courts to preserve the *status quo* in order "to save the public interest from injury or destruction" during the pendency of an

appeal. This was stated to be in accord with "the purpose of Congress to utilize the courts as a means for vindicating the public interest. Courts and administrative agencies are not to be regarded as competitors in the task of safeguarding the public interest. *United States v. Morgan*, 307 U. S. 183, 190-91; *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134. Courts no less than administrative bodies are agencies of government. Both are instruments for realizing public purposes." 316 U. S. at 15; see also, *United States v. Ruzicka*, 329 U. S. 287, 295; cf. *Addison v. Holly Hill Co.*, 322 U. S. 607, 620-622.

2. In determining whether the Commission was entitled to the injunctive assistance which it sought, the court below erred in itself undertaking to determine the substantive question for the determination of which the Commission had instituted the investigation, *i. e.*, whether Panhandle's disposition of the reserves was subject to the Commission's jurisdiction and hence whether the transfer violated the Natural Gas Act or Commission orders issued pursuant thereto. The court should, we submit, have limited its inquiry to whether there was a reasonable basis for the Commission's action in instituting the investigation, and should have left it to the Commission to determine in the first instance whether the facts disclosed by its investigation presented any basis for Commission

jurisdiction or action.¹⁰ *West India Fruit & Steamship Co. v. Seatrain Lines*, *supra*, p. 10, fn. 8.

Such limitation on the court's inquiry not only is in harmony with the principle of cooperation between the federal courts and federal administrative agencies, discussed *supra*, but accords with the established principle that the administrative agency is the judge, in the first instance, of the scope of its statutory jurisdiction. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41; *Macauley v. Waterman Steamship Corp.*, 327 U.S. 540; *Federal Power Commission v. Arkansas Power & Light Co.*, 330 U.S. 802; *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186; *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501. The principle is applicable both where the problem before the administrative agency is factual in nature and where it is a "purely legal problem" as well.¹¹ In *Federal Power Commission v. Arkansas Power & Light Co.*, *supra*, where the Court of Appeals for the District of Columbia had refused to permit the Commission first to pass on the questions there involved on the ground that they were purely legal (156 F. 2d 821, 828), this Court reversed *per curiam*. See also *Macauley v. Waterman Steamship Corp.*,

¹⁰ If the final order issued by the Commission as a result of its proceeding is adverse to Panhandle, Panhandle of course, could seek judicial review thereof, in accordance with the provisions of Section 19 of the Act, Appendix, *infra*, pp. 31-33.

¹¹ The problems before the Commission in regard to whether Panhandle's proposed transfer violated the Act or the Commission's orders are both legal and factual, see *infra*, pp. 16-22.

supra, at 544; *Myers v. Bethlehem Shipbuilding Corp.*, *supra*, at 51 and cases cited. Moreover, the fact that the Commission, not a private litigant, was invoking judicial assistance, does not warrant departure from this principle, for the underlying reasons—comity between court and administrative agency, and desirability of orderly procedure—appear equally applicable, whether a private litigant invokes judicial process to interfere with an administrative proceeding, or, where, as here, the administrative agency seeks judicial aid to protect its proceeding. And as this Court has held, federal courts grant an administrative agency's request for assistance upon a finding of only "probable cause," where it is the agency, not a private litigant, which is seeking judicial help.¹² *Oklahoma Press Pub. Co. v. Walling*, *supra*; *Endicott-Johnson Corp. v. Perkins*, *supra*.

The failure of the court below to permit the Commission to determine in the first instance the scope of its statutory jurisdiction conflicts with the ruling of the Court of Appeals for the Second Circuit in *West India Fruit & Steamship Co. v. Seatrains Lines*, 170 F. 2d 775. In that case, as here,

¹² To so limit the scope of judicial inquiry in determining whether to grant an injunction to aid the Commission in the protection of the public interest is consistent with the fact that "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Virginian Ry. Co. v. System Federation*, 300 U. S. 515, 552; *Yakus v. United States*, 321 U. S. 414, 440-441 and cases cited.

an injunction was sought to maintain the *status quo* pending an investigation instituted by the Maritime Commission into whether certain reductions in rates proposed by Seatrains violated the Shipping Act of 1916, as amended. The Second Circuit there affirmed the granting of the injunction, leaving the Commission to "determine whether it had statutory jurisdiction and if so, how it should act." 170 F. 2d at 779. In so doing, the court refused to follow its earlier decision in *Securities & Exchange Commission v. Long Island Lighting Co.*, 148 F. 2d 252, and in addition distinguished it upon the ground that in that case the court "rested its conclusion on a holding that the S. E. C. unmistakably lacked any possible jurisdiction; on the facts now before us, we are unable so to hold as to the Commission here." 170 F. 2d at 779. The court below in the instant case should, we submit, have followed this approach and similarly limited its inquiry into whether there was any reasonable basis for Commission jurisdiction.

3. There is in the Natural Gas Act, we submit, at least a reasonable basis for Commission control over a natural gas company's disposition of its gas reserves. Section 7(b) of the Act (Appendix, *infra*, pp. 27-28), prohibits the abandonment by a natural gas company of "all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval

of the Commission * * * *¹³ Whether the transfer of reserves is excluded from the Commission's control under Section 7(b) depends, on whether these gas reserves are within the "production or gathering of natural gas" exemption of Section 1(b).¹⁴

The court below, we submit, misconstrued the scope of this exemption by reading the term "facilities" into the exemption and construing that term in accordance with its dictionary definition. That exemption, however, is not so to be rewritten, but rather is to be read as written and in accordance with its purpose, as manifested by the relevant legislative materials. *Colorado Interstate Co. v. F.P.C.*, 324 U.S. 581; *Interstate Natural Gas Co. v. F.P.C.*, 331 U.S. 682; *F.P.C. v. Hope Natural Gas Co.*, 320 U.S. 591; cf. *Panhandle Eastern Pipe Line Co. v. Public Service Commis-*

¹³ Section 7(b) continues on to require that the Commission not permit such abandonment without a finding "that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted or that the present or future public convenience or necessity permit such abandonment."

¹⁴ The Commission's disclaimer of control over production and gathering quoted by the court below (R. 78), merely paraphrases the statutory language and was not intended to be broader in scope than the statutory exemption itself. Similarly, the statement below that "It has been the practice in the natural gas industry for companies to trade freely in gas leases, and the Commission has never heretofore asserted the right to regulate transfers of such leases" (R. 78), does not present the full picture. Until this time, such trading has taken place with the view of blocking in reserves and improving service (R. 72), and not to achieve the results here sought by Panhandle. See *infra*, pp. 22-24.

sion, 332 U.S. 507. As explicitly recognized in these cases, the exemption has but a limited scope, and as an exception to the primary grant of jurisdiction, is "to be strictly construed." *Interstate* case at 690-691. It was made part of the Act, in accordance with the Act's purpose of complementing state regulation and occupying the field in which this Court had held the states could not act, in order to preserve to the states powers of regulation in areas in which they could act, and not to free companies from effective public control. (*Interstate* case at 690; *Hope* case at 610; H. Rep. No. 709, 75th Cong., 1st sess., p. 2).¹⁵ The Act envisaged a comprehensive and effective scheme of dual regulation, state and federal, to protect the consumers against exploitation at the hands of natural gas companies. "It does not contemplate ineffective regulation at either level." *Public Service Commission* case at 520-521. Thus, the exemption was not intended as a means to defeat effective regulation and does not extend to all aspects of the producing or gathering of gas but

¹⁵ The House Committee on Interstate and Foreign Commerce in its report which the Senate Committee on Interstate Commerce adopted verbatim characterized the exemptions of Section 1(b) as "not actually necessary, as the matters specified therein could not be said fairly to be covered by the language affirmatively stating the jurisdiction of the Commission, but similar language was in previous bills, and, rather than invite the contention, however unfounded, that the elimination of the negative language would broaden the scope of the act, the committee has included it in this bill." H. Rep. No. 709, 75th Cong., 1st sess., p. 3; S. Rep. No. 1162, 75th Cong., 1st sess., p. 3.

only those over which the states have power to act, i.e., regulation of "the physical production and gathering of natural gas in the interests of conservation or of any other consideration of legitimate local concern." *Interstate case* at 690.

Read in light of these standards, Section 1(b) does not necessarily deny the Commission jurisdiction over the transfers here involved. On one hand, the existence of Commission jurisdiction does not conflict with state regulation. The various state statutes referred to by the court (R. 76) below only make provision for conservation of natural gas resources; none of these statutes attempts to control the transfer or disposition of gas leases and reserves. Kansas Gen. Stat., c. 55, §§ 701-713 (Supp. 1947); Mich. Stat. Ann., c. 97 (Supp. 1947); Okla. Stat. Ann., Tit. 52, c. 3, §§ 231-247; Texas Rev. Civ. Stat., Tit. 102, § 6008 *et seq.* (Vernon 1925, with Supp. 1948); see, also, La. Gen. Stat., Secs. 4766-4826.2. Nor does the Kansas State Corporation Commission which has intervened claim such power (R. 70-74). On the other hand, absence of jurisdiction in the Commission over these transfers may defeat effective regulation in the public interest. Not only would the existence of such jurisdiction protect the public interest by controlling natural gas company's disposition of its reserves with the result, as we show, *infra*, p. 24, of obtaining increased rates, but it also assures the public that a company will not, by disposing of its gas

reserves, disable itself from rendering service and thereby, for all practical purposes, abandon service without Commission approval, contrary to the mandate of Section 7(b).¹⁶

Furthermore, additional bases of jurisdiction may be revealed in the course of the investigation which the Commission has initiated and pending which it has sought judicial aid in maintaining the *status quo*. For example, Panhandle has in three applications for additional certificates of public convenience and necessity seeking authority to construct additional facilities costing about \$57,000,000 under Section 7(c) of the Act, Appendix, *infra*, pp. 28-29, included most of the acreage here involved in support of its claim that it had natural gas reserves adequate to justify the issuance of the certificates sought. F. P. C. Docket Nos. G-706, 876;

¹⁶ The 96,000 acres here involved are estimated to contain 700 million cubic feet of natural gas, which is about 12% of the 6,000 billion cubic feet of gas reserves owned or controlled by Panhandle (R. 27). Panhandle, however, claims that the proposed transfer will result in a net decrease in its reserves of less than 5%. This is apparently based on the assumption that Panhandle in 1965 will exercise its option to purchase from Hugoton the 400 billion cubic feet of gas which the Panhandle-Hugoton contract contemplated would then remain. *Supra*, p. 6. But whether the 400 billion cubic feet will then remain or be then divertible to Panhandle depends on the needs of the Kansas Power & Light Company, which Hugoton contracted to supply (*supra*, p. 6), and the requirements of the state regulatory commission. In any case, the proportion of Panhandle's total reserves represented by the acreage here involved is irrelevant in the present posture of the case. The factor will become material only on the substantive question of whether the transfer should be permitted if and when it be held that the Commission does have jurisdiction over such transactions.

supra, p. 5, fn. 3. These certificates were issued upon the finding by the Commission based on these representations that Panhandle had adequate reserves to warrant its expansion. 5 F. P. C. 544, 546; 949, 952 (F. P. C. Docket No. G-706, orders of June 4, 1946 and of November 30, 1946); F. P. C. Docket G-876, order of June 10, 1948, *supra*, p. 5.

In these circumstances, the transfer of these reserves may, depending on the evidence adduced at the hearing, constitute a violation of the obligations under Section 7(c) of the Act and the Commission's orders issuing these certificates requiring that the reserves so represented as being available to furnish the augmented service, be kept available to furnish such service.¹⁷ Cf. *City of Jamestown v. Pennsylvania Gas Co.*, 1 F. 2d 871, 882 (C. A. 2). Similarly, these gas reserves were included, on the basis of Panhandle's representations, as "used and useful property" in rate base determined by the

¹⁷ The court below, in rejecting such an implied obligation on the ground that if it existed, it would extend to outworn truck and obsolete drilling machines (R. 79) failed to appreciate the vast difference in importance between such equipment and natural gas in the operation of a natural gas pipeline system. Trucks and drilling machines are merely incidental pieces of equipment and, in contrast to natural gas reserves, need not be detailed in applying for a certificate of public convenience and necessity. On the other hand, natural gas is the life blood of a natural gas company, and indeed, the availability of gas determines the very existence and operation of the company. While the physical life of pipeline is comparatively long (60 years or more), gas reserves are exhaustible in a much shorter period, with the result that the service life of a natural gas company's facilities is limited by the life of its gas reserves. Cf. *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U. S. 575, 597.

Commission in connection with its investigation into Panhandle's rates, and to date Panhandle has received from its customers in excess of \$665,000 to compensate it for the costs of maintaining these leases. *Supra*, p. 5. Depending on the facts developed during the investigation, the transfer of the reserves which cost Panhandle only \$162,564.90 (R. 37), might in these circumstances violate that rate order.

4. In prejudging the Commission's jurisdiction and holding that the Commission is without jurisdiction over the transfer of reserves by a natural gas company, regardless of the circumstances or effects of such disposition, the court below has provided a loophole in the statutory scheme which natural gas companies producing all or part of their own gas have unsuccessfully sought from this Court and Congress, namely, to obtain, at the expense of ultimate consumers, increased revenue consisting of the difference between actual cost and the increasing field value of such gas, which now is substantially higher. In *Colorado Interstate Gas Co. v. Federal Power Commission*, 324 U. S. 581; and *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 324 U. S. 635, the companies urged that they were entitled to field price for this gas on the ground that the inclusion of such gas at actual cost in fixing rates involves regulation of production and gathering of gas, contrary to the mandate of Section 1(b); this Court rejected that conten-

tion (324 U. S. at 597-604, 648-649).¹⁸ Subsequently, bills were introduced into Congress (S. 734, S. 1028, H. R. 4051,¹⁹ 80th Cong., 1st sess.) to amend the Natural Gas Act so as to require the Commission to allow as an operating expense, "the prevailing market price" of such gas. H. R. 4051 was passed by the House on July 11, 1948. 93 Cong. Rec. 8751. Upon reference of the bill to the Senate Committee on Interstate and Foreign Commerce (93 Cong. Rec. 8760), and after extensive hearings, at which the potential increased costs to consumers were discussed (see Hearings before Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 80th Cong., 2d sess., on H. R. 4051), that Committee did not report the bill for further action.²⁰

In connection with the proposed amendments, and based on the assumption of a 7-cent field price and certain other assumptions, the Bureau of Accounts, Finance and Rates of the Commission analyzed the effect of valuing company-produced gas at "field prices" instead of at actual cost on the

¹⁸ The Court commented (324 U. S. at 601): "Congress of course might have provided that producing or gathering facilities be excluded from the rate base and that an allowance be made in operating expenses for the fair field price of the gas as a commodity. Some have thought that to be the wiser course. But we search the Act in vain for any such mandate."

¹⁹ H. R. 4051 was the so-called Rizley bill.

²⁰ Senators Moore and Capehart of the subcommittee which held the hearings had favorably reported the bill on April 3, 1948. Senator Stewart, the third member of the subcommittee, filed a separate and unfavorable report.

rates of eleven natural gas companies, including Panhandle. It estimated that the rates of these eleven companies would be increased by about \$56,000,000 per year (\$41,000,000 to regulated customers, \$15,000,000 to unregulated customers) and that Panhandle's rates would be increased by \$8,292,016 per year. Hearings before Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 80th Cong., 2d sess., on H. R. 4051, pp. 291-318, 338.²¹

CONCLUSION

The Commission was entitled to judicial assistance in its inquiry into the question whether the particular disposition of reserves involved in this case had aspects which brought it within the Commission's jurisdiction. The courts below erred in denying the Commission an effective opportunity to investigate the facts in order to ascertain whether it had, or should take, jurisdiction. The decision below raises questions of substantial public importance, affecting the functioning of federal administrative agencies and their relationship to the federal courts in the task of effectuating the intent

²¹ Mr. John Jirgal, appearing on behalf of the Independent Natural Gas Association of America, estimated on different assumptions that the rate increases would amount to slightly over \$10,000,000, \$8,000,000 of which would be applicable to regulated business. See Hearings, *supra*, p. 17. The validity of the assumptions on which both analyses are based has been questioned.

of Congress. Accordingly, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Solicitor General

BRADFORD ROSS,

General Counsel,

Federal Power Commission.

FEBRUARY 1949.

APPENDIX

The pertinent provisions of the Natural Gas Act (52 Stat. 821, as amended by 56 Stat. 83, 15 U.S. C. 717 *et seq.*) read as follows:

SECTION 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

* * * * *

SAC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and

regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this Act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

* * *

Sec. 7. * * *

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the

jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commis-

sion within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any

qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity: otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

* * * * *

SEC. 14. (a) The Commission may investigate any facts, conditions, practices, or matters which it may find necessary or proper in order to determine whether any person has violated or is about to violate any provision of this Act or any rule, regulation, or order thereunder, or to aid in the enforcement of the provisions of this Act or in prescribing rules or regulations thereunder, or in obtaining information to serve as a basis for recommending further legislation to the Congress. The Commission may permit any person to file with it a statement in writing, under oath or

otherwise, as it shall determine, as to any or all facts and circumstances concerning a matter which may be the subject of investigation. The Commission, in its discretion, may publish in the manner authorized by section 312 of the Federal Power Act, and make available to State commissions and municipalities, information concerning any such matter.

(b) The Commission may, after hearing, determine the adequacy or inadequacy of the gas reserves held or controlled by any natural-gas company, or by anyone on its behalf, including its owned or leased properties or royalty contracts; and may also, after hearing, determine the propriety and reasonableness of the inclusion in operating expenses, capital, or surplus of all delay rentals or other forms of rental or compensation for unoperated lands and leases. For the purpose of such determinations, the Commission may require any natural-gas company to file with the Commission true copies of all its lease and royalty agreements with respect to such gas reserves.

Sec. 19 * * *

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by

filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript, such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modi-

fied or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

* * * * *

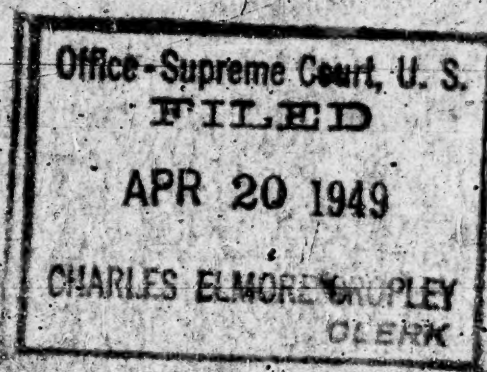
SEC. 20. (a) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this Act, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States, the District Court of the United States for the District of Columbia, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this Act or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices or concerning apparent violations of the

Federal antitrust laws to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings.

(b) Upon application of the Commission the district courts of the United States, the District Court of the United States for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this Act or any rule, regulation, or order of the Commission thereunder.

**BRIEF
for
the
F.P.C.**

LIBRARY
SUPREME COURT U.S.



No. 558

In the Supreme Court of the United States

OCTOBER TERM, 1948

FEDERAL POWER COMMISSION, PETITIONER

v.

PANHANDLE EASTERN PIPE LINE COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 558

FEDERAL POWER COMMISSION, PETITIONER

PANHANDLE EASTERN PETROLEUM COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

OPINIONS BELOW

The unreported findings of fact, conclusions of law, and opinion of the United States District Court for the District of Delaware appear in the Record at pages 49-50, 60-66. The opinion of the United States Court of Appeals for the Third Circuit (R. 74-81) is reported at 172 F. 2d 57.

JURISDICTION

The judgment of the Court of Appeals was entered on January 6, 1949 (R. 81). The petition for a writ of certiorari was filed on February 10, 1949, and granted on March 28, 1949 (R. 87). The

jurisdiction of this Court rests upon 28 U. S. C. 1254.

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act (Act of June 21, 1938, c. 556, 52 Stat. 821, as amended by the Act of February 7, 1942, c. 49, 56 Stat. 83, 15 U. S. C. 717 *et seq.*) appear in the pamphlet copy of the Act submitted with this brief.

QUESTIONS PRESENTED

The Federal Power Commission instituted an investigation, pursuant to Section 14 of the Natural Gas Act, to inquire into the circumstances surrounding the proposed disposition of certain gas reserves owned by respondent Panhandle, a natural-gas company subject to the Commission's jurisdiction under the Act. The investigation was for the purpose of determining whether the Commission had jurisdiction with respect to the proposed disposition and, if so, whether any Commission action was required. The Commission ordered that the *status quo* be maintained pending the outcome of its investigation, but Panhandle refused to comply with this order. Upon the Commission's application to a district court for an injunction to maintain the *status quo* pending the outcome of its investigation, the court withheld such aid from the Commission. The court below affirmed on the basis of its independent determination that the Commission had no

jurisdiction to exercise control over a natural-gas company's disposition of its gas reserves, and that no conceivable facts which the Commission might find could give it any jurisdiction.

The broad question presented is whether, on the basis of the showing made by the Commission, the courts below were warranted in withholding the interlocutory relief sought. In particular, the question is whether the Court of Appeals erred in holding that the Natural Gas Act on its face precludes the Commission from exercising any control over a natural-gas company's disposition of its gas reserves, regardless of the circumstances, and hence bars the Commission from obtaining judicial aid in maintaining the *status quo* pending the outcome of its investigation.

STATEMENT

Respondent, Panhandle Eastern Pipe Line Company (Panhandle), is a "natural-gas company" subject to the jurisdiction vested in the Federal Power Commission by the Natural Gas Act. It owns and operates an integrated natural-gas pipe-line system originating in the Hugoton and Panhandle natural-gas fields of Kansas, Oklahoma, and Texas and extending across the States of Oklahoma, Kansas, Missouri, Illinois, Indiana, and Ohio and into the State of Michigan (R. 3-4). It supplies natural gas to distributing companies along the route of its pipe

lines, serving more than 1,500,000 customers. These distributing companies have supply contracts with Panhandle which are filed with the Commission as rate schedules (R. 4).

In October 1948, Panhandle owned, as part of its integrated pipe-line system, substantial gas reserves, including approximately 96,000 acres of gas leases, located in the Kansas portion of the Hugoton gas field and containing an estimated 700 billion cubic feet of gas (R. 4). In 1942, on the basis of Panhandle's representations that they were "used and useful property," most of these 96,000 acres of reserves, although not developed and not connected with any existing pipe-line system, were included by the Commission in fixing Panhandle's rate base, and delay rentals, renewal bonus payments and all other exploration and development costs relating to these leases were similarly allowed as revenue deductions. *City of Detroit v. Panhandle Eastern Pipe Line Co., In the Matter of Panhandle Eastern Pipe Line Co.*, F. P. C. Dockets G-200, G-207, 3 F. P. C. 273, affirmed, 143 F. 2d 488 (C. A. 8), 324 U. S. 635. To date, more than \$665,000 has been so deducted (R. 7, 12).

In addition, Panhandle has included most of these 96,000 acres among the reserves which it represented to the Commission were adequate to justify the issuance of certain certificates of public convenience and necessity for which it applied during and after 1946 (R. 12-14), pursuant to

Section 7 of the Act, as amended. One instance was its applications for certificates to construct and operate its so-called "Group A and B" facilities (F. P. C. Docket G-706) where it included 71,000 of these 96,000 acres; another, its "Group C" facilities (F. P. C. Docket G-876), where it included all but 1,640 of these 96,000 acres. These facilities, the cost of which was estimated at about \$57,000,000, were designed to augment service to existing customers on Panhandle's system (R. 7, 15). On the basis of these representations, the Commission found, *inter alia*, that Panhandle's gas supply was adequate to meet the requirements of the service to be rendered by means of the proposed facilities and issued the requested certificates (R. 13-14); 5 F. P. C. 544, 546; 949, 952 (F. P. C. Docket G-706; orders of June 4, 1946, and of November 30, 1946); F. P. C. Docket G-876, order of June 10, 1948.

On September 22, 1948, Panhandle caused the creation of Hugoton Production Company (Hugoton); a Delaware corporation (R. 4, 61), the officers, directors and offices (other than the statutory office in Delaware) of which are the same as

Section 57.5 of the Commission's Order No. 99, amending its Provisional Rules of Practice and Regulations under the Natural Gas Act (7 Fed. Reg. 6844) provides:

"Applications for certificates of public convenience and necessity * * * shall set forth * * * the following * * *

"(f) A statement of the gas reserves which are to supply the market which is proposed to be served * * *

those of Panhandle (R. 5, 32, 33). On October 11, 1948, pursuant to an agreement of the same day, Panhandle transferred to Hugoton its right, title and interest in the 96,000 acres of gas reserves in return for 810,000 shares of Hugoton's stock (R. 4-5, 15, 61).² Hugoton agreed to proceed promptly to develop this acreage and to attempt to negotiate sales of the gas to purchasers other than Panhandle, subject however to an option in Panhandle to purchase on and after January 1, 1965, at the going market price, all or any specified portion of the gas produced from these reserves which, the agreement contemplated, would then contain 400 of the 700 billion cubic feet of gas estimated to be there now (R. 4-5, 27, 61). On October 18, 1948, seven days later, Hugoton contracted to sell gas from these reserves to the Kansas Power and Light Company, at a minimum price of 12 cents per Mcf, all such gas to be produced from wells located in the State of Kansas and to be consumed by Kansas Power and Light Company or sold by it for consumption wholly within that State (R. 27, 61, 71).

On the same day that the reserves were transferred to Hugoton (October 11, 1948), Panhandle's Board of Directors declared a dividend of 1/2 share

² Of the 1,500,000 shares of \$1.00 par value stock authorized, Hugoton issued only 810,000 shares. All the issued stock was to be transferred to Panhandle in accordance with the agreement. Panhandle also paid Hugoton \$675,000 in cash and transferred some small additional oil acreage not here relevant (R. 4, 5, 61).

of Hugoton stock for each share of Panhandle's outstanding 1,620,000 shares of common stock, payable on November 17, 1948, to stockholders of record at the close of business on October 29, 1948 (R. 5, 29-30, 62-63). Notice of this action was immediately sent to Panhandle's stockholders (R. 25, 31-32). Thereafter, Hugoton stock was traded "over-the-counter" on a "when, as and if basis" at approximately \$13.50 per share (R. 26, 37, 63). The Commission was informally advised of these transactions the next day (R. 38). On October 29, Panhandle delivered to Hugoton's transfer agent, stock certificate No. 1 for 810,000 shares of Hugoton common stock registered in Panhandle's name and assigned in blank for transfer to Panhandle's stockholders of record on that day (R. 23-26, 34, 63). By November 13, the date on which the Commission filed its complaint in the district court and secured an *ex parte* restraining order (see *infra*, pp. 8-9), the transfer agent had prepared stock and scrip certificates registered in the names of Panhandle's stockholders, and inserted these certificates in envelopes to be mailed on November 15 and 16 (R. 26).

³ At that price, the value of the leases transferred to Hugoton was over \$10,000,000 (R. 37). Panhandle's officers estimated that the market price of the stock would increase to \$20.00 per share (R. 37, but see R. 49) which, as applied to the 810,000 shares, represents a market valuation of approximately \$16,000,000 for the leases. The total original cost of these leases was about \$100,000 and the annual expenses of carrying them was about \$67,000 per year (R. 37).

Meanwhile, by order dated October 26, 1948, the Commission instituted an investigation, pursuant to Section 14 of the Act, "of the facts and circumstances involved in the formation and proposed operation of the Hugoton Production Company and the transfer to said company by Panhandle * * * (R. 11, 63). By supplementary order dated November 10, 1948, the Commission fixed a date for hearing and ordered Panhandle and Hugoton to show cause why they should not be directed to cancel the contract of October 11; to refrain from again transferring these gas reserves without the Commission's consent; and to refrain from paying the Hugoton stock as a dividend, or otherwise transferring it (R. 6, 11-18). The Commission also ordered that the *status quo* be maintained pending final determination of the questions presented (R. 6, 16, 17). Panhandle was advised of the order by telegram and was directed to notify the Commission by November 12 that it would comply with the restraint ordered (R. 7, 21). Panhandle failed and refused to do so (R. 7, 39).

In its complaint filed on November 13 in the United States District Court for the District of Delaware, the Commission, invoking both Section 20 (a) of the Natural Gas Act and the court's general equity powers, prayed that Panhandle be

*With Panhandle's consent, the Commission's oral motion, made during argument before the district court to amend the complaint to invoke the court's general equity power, was granted (R. 45, 64).

restrained from proceeding further in the stock distribution, and that it be required to maintain the *status quo* pending final determination by the Commission of the questions presented at the hearing before it (R. 1-18).⁵ An *ex parte* restraining order was granted (R. 21-23). The district court, thereafter, however, refused to grant a preliminary injunction on the ground that the Commission's complaint, motion, and the affidavits filed by it and by Panhandle (R. 20-21, 24-37) "do not show any basis for the relief sought" (R. 49, 66).⁶ On appeal, the court below affirmed (R. 74-81). The primary ground of the opinion

⁵ According to an affidavit filed by the Commission in support of injunctive relief, the Chairman of Panhandle's Board of Directors had stated as follows: " * * * the Hugoton Production Company had been organized by Panhandle because the Federal Power Commission had placed the valuable gas reserves of Panhandle in Panhandle's rate base, thereby preventing Panhandle from realizing the full value of said reserves, and that the assignment of gas reserves to Hugoton Production Company and the proposed operating plan of Hugoton Production Company had resulted from careful studies made for the purpose of avoiding regulation of the earnings from the sale of gas produced and gathered from said gas reserves; that if the Federal Power Commission persisted in its present rate fixing methods and procedures, Panhandle might form other production companies similar to Hugoton Production Company which company represented only the start of Panhandle's endeavor to realize additional and unregulated profits for its stockholders from its gas reserves; * * * " (R. 37).

The making of that statement was denied in an affidavit filed by Panhandle (R. 48-49).

⁶ The district court permitted the intervention of several of Panhandle's stockholders as defendants (R. 64-65).

below was that Section 1 (b) of the Act exempting "production or gathering of natural gas" from Commission jurisdiction withdrew from the Commission any authority to institute an investigation into the circumstances surrounding a natural-gas company's disposition of gas reserves, and that no conceivable facts which the Commission might find in the course of its investigation could warrant the injunctive assistance of the court. Pending final disposition of the case by this Court, distribution of the Hugoton stock and further transfer of the reserves have been stayed (R. 83).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that a federal court shall, in the first instance, independently determine the scope of the jurisdiction of a federal administrative agency when the latter seeks injunctive assistance to maintain the *status quo* pending the outcome of an investigation instituted by such agency.

2. In holding that the facts of this case do not call for the exercise of the court's equitable powers to maintain the *status quo* pending the outcome of the Commission's inquiry.

3. In failing to hold that there is a reasonable basis in the Natural Gas Act for Commission jurisdiction over a natural-gas company's disposition of its gas reserves.

* The State Corporation Commission of the State of Kansas was permitted to intervene in the court below (R. 74).

4. In holding that under the Natural Gas Act, the Commission has no jurisdiction in any circumstances over a natural-gas company's disposition of its gas reserves.

5. In affirming the judgment of the District Court.

SUMMARY OF ARGUMENT

This case involves the refusal of federal courts to lend their assistance to the Commission to maintain the *status quo* pending the outcome of its investigation into whether the disposition of certain gas reserves by Panhandle to Hugoton violated the Natural Gas Act. This denial of aid was based primarily on an erroneous reading of the "production or gathering of natural gas" exemption in Section 1 (b) of the Act as withholding from the Commission any possible regulatory authority over a natural-gas company's dispositions of its gas reserves, regardless of the circumstances. The other grounds of the holding below, as well as the various contentions of the respondents, present no obstacle to the granting of the assistance sought.

I

A. In construing the "production or gathering of natural gas" exemption as denying to the Commission authority over a natural-gas company's disposition of natural-gas reserves, the court below improperly rewrote the exemption to apply to production and gathering facilities and disregarded the limited application and purpose of the exemp-

tion, as manifest from the Act and its legislative history. Several provisions of the Act affirmatively vest jurisdiction in the Commission in regard to production and gathering properties, including gas reserves. These provisions were ignored by the court below in holding that the Section 1 (b) exemption has a "pretty wide meaning," embracing all production and gathering facilities. Moreover, the Act's legislative history makes it plain that the purpose of Congress in enacting the Act was to provide a comprehensive scheme of complementary regulation, state and federal, of natural gas companies. It further reveals, as this Court has recognized, that the purpose of the Section 1 (b) exemption was not to frustrate this scheme, or leave substantial gaps therein, but rather to leave to the states regulation over the matters of local concern, i. e., "the power to regulate the physical production and gathering of natural gas in the interests of conservation or of any other consideration of legitimate local concern." *Interstate Natural Gas Co. v. F. P. C.* 331 U. S. 682, 690; See, also, *Colorado Interstate Gas Co. v. F. P. C.*, 324 U. S. 581, 602-605.

B. Read in accordance with its limited scope and purpose, the "production or gathering of natural gas" exemption clearly was not intended to deny to the Commission any jurisdiction to inquire into dispositions of gas reserves, with a view towards taking such regulatory action as the

facts found, might require. Such jurisdiction does not involve matters of local concern, regulated by the states, as the various state statutes cited reveal. In none of these statutes relating to proration and conservation of natural gas, including that of Kansas, the state where the gas reserves here involved are located, is there any attempt made to regulate the disposition of such reserves. And the "deep concern" in regard to such transfer, expressed by the State Corporation Commission of Kansas falls far short of a claim of a right on the part of that Commission to control such disposition.

On the other hand, Commission control over a natural-gas company's disposition of its gas reserves might be necessary for effective exercise of its authority. The absence of such jurisdiction would result in substantial gaps in the comprehensive regulatory scheme envisaged by Congress. For example, the lack of Commission control over such dispositions, regardless of the circumstances, might enable a company to disable itself from rendering service and thereby abandon service in whole or in part without Commission approval, contrary to the mandate of Section 7 (b) of the Act forbidding such abandonments "without the permission and approval of the Commission first had and obtained."

Commission control is also necessary to enable the Commission to prevent a natural-gas company from repudiating its dedication of such gas reserves to the discharge of its obligations as a

public utility. Panhandle has so dedicated the reserves here involved by listing them in support of applications for certificates of public convenience and necessity as "gas reserves which are to supply the market which is proposed to be served" and by representing them in the course of the Commission's rate investigation as "used and useful property" includible in the rate base. Power in the Commission to enforce such dedication is "necessary or appropriate to carry out the provisions of" the Act since it is "in the interests of the public" and "in harmony with the purposes of the Act." Section 16; cf. *F. P. C. v. Natural Gas Pipe Line Co.*, 315 U. S. 575, 585. The existence of this power is expressly confirmed by the legislative history of the 1942 amendment to Section 7 where Congress omitted a proposed subsection expressly granting such power to the Commission, with the comment that "It is believed that the meaning of the bill, with these changes, is substantially the same as before." H. Rep. No. 1290, 77th Cong., 1st sess., pp. 4-5. The absence of such power, particularly in the situation here presented would enable an applicant for a certificate to dispose of its gas reserves immediately after the certificate was issued. As a result, the statutory requirement that the Commission make findings as to ability to perform would be meaningless, and its jurisdiction over the constructions and extension of facilities, futile.

Finally, Commission control over such dispositions is essential to protect its rate-making functions as approved by this Court. Such power is likewise "necessary or appropriate to carry out the provisions of the Act." Section 16. In the absence of such control, the Commission's power to include a natural-gas company's production and gathering facilities in the rate base at original cost would, for all practical purposes, be thwarted, and the Commission would be frustrated in striking a proper balance between the investors' and consumers' interests in thus fixing just and reasonable rates. Ratewise, the effect of holding that the Commission is without this power will be substantially to increase rates to ultimate consumers, as evidenced by the sharp contrast between the \$10,000,000 market valuation and \$160,000 original cost of these reserves.

II

Since the Commission does have jurisdiction to investigate a natural-gas company's disposition of its gas reserves and to take such regulatory action as the facts may warrant, the district court erred in denying the injunction sought by the Commission and in refusing to lend its assistance to enable the Commission to proceed.

A. The injunction should have been granted to enforce the Commission's order of November 10 directing Panhandle to maintain the *status quo*. Section 20 (a) of the Act, providing that the

Commission may seek judicial assistance to enjoin any person "engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this Act, or of any rule, regulation or order thereunder" is squarely applicable. The contrary holding of the court below is based solely on its erroneous reading of the Section 1 (b) exemption.

Panhandle's attack on the validity of this order on other grounds was properly rejected below. Contrary to Panhandle's contention, the order of November 10 did not involve the exercise of judicial power any more than a Commission order directing a natural-gas company to reduce its rates or prohibiting a company from abandoning service. Such orders bear only a superficial resemblance to mandamus and injunction. Moreover, the absence of power in the Commission to require compliance or to assess penalties for failure to comply further distinguishes an administrative from a judicial order. Nor does an order enforceable under Section 20 need to be reviewable under Section 19 (b). The language of Section 20, as well as that of other sections, particularly Section 16, makes it clear that the orders enforceable under Section 20 include many not reviewable under Section 19 (b). Interlocutory orders, issued under Section 16, to be effective, must necessarily be enforceable under Section 20; otherwise, the authority to issue such orders would be a nullity.

B. Even apart from Section 20, the court should have granted the injunction in the exercise of its general equity power. Here again, affirmation by the court below of the district court's action was based solely on its erroneous conclusion that the Commission could not, in any conceivable circumstances, take jurisdiction over the transfer of a gas reserve. The district court unquestionably had the general equity power to assist the Commission to function effectively by maintaining the *status quo* pending the outcome of its investigation of possible statutory violations. The traditional basis for granting of such relief is available when an administrative agency is requesting judicial assistance in order to be able to function effectively in carrying out Congressional policies. And the situation here presented called for the exercise of that power. The proposed investigation might disclose that the disposition of the reserves is inconsistent with the public interest, that it violated the Natural Gas Act, and that it would cause great and irreparable injury to the public served by the Panhandle system. Since the Commission was seeking the injunctive relief to protect the public interest, the equitable powers of the court assumed an even broader and more flexible character than when only a private controversy is at stake.

C. The various contentions of Panhandle's stockholders were properly rejected by the court below. The Panhandle-Hugoton transaction was

not "a thing done." Under the Uniform Stock Transfer Act, which all parties agree is here applicable, title to the stock had not been transferred to the stockholders. The stockholders had not received the certificates and the Act clearly provides that the shares of stock were to be represented by the certificate and that title to the shares could be transferred only by delivery thereof. Delivery of the block certificate to the transfer agent was not delivery to Panhandle stockholders; the transfer agent was simply Panhandle's agent to make delivery to the transferees and was not an agent of the stockholders.

Moreover, the intervening stockholders had no equitable rights warranting the denial to the Commission of injunctive assistance. They had not purchased the stock for value in good faith. They had paid nothing for the stock and hence their position as intended recipients of a dividend, which Panhandle was not obliged to declare was somewhat analogous to that of a donee. In any case, whatever equitable rights they had were far outweighed by the countervailing public interest here in maintaining the *status quo* pending the outcome of the Commission's investigation. Any hardship suffered by the stockholders resulted from Panhandle's delivery of the block certificate to the transfer agent on October 29 notwithstanding due notice of the Commission order of October 26 instituting the investigation.

ARGUMENT

In this case, the Commission has instituted an investigation into the facts and circumstances surrounding Panhandle's proposed disposition of certain natural-gas reserves to Hugoton for the purpose of determining whether the proposed transfer violated the Natural Gas Act or Commission orders issued thereunder or required Commission action in order to protect the public interest. Ancillary thereto, the Commission ordered Panhandle to stay its hand and maintain the *status quo*. Upon Panhandle's refusal to comply, the Commission sought the assistance of a district court to enforce compliance with its order and to maintain the *status quo* pending the outcome of the investigation. The district court refused to lend its aid to the Commission and denied the requested injunction.

The affirmance by the court below of the district court's action was based, not on a lack of power in the court to grant the relief sought or on countervailing equitable considerations, as urged by Panhandle and its stockholders, but rather on its construction of the Natural Gas Act, particularly the provision of Section 1 (b) exempting from Commission jurisdiction "the production or gathering of natural gas." The court below read this provision as a flat denial to the Commission of any authority to inquire into a natural-gas company's disposition of any of its gas leases and reserves, regardless of the

facts, purposes, or adverse effects on the public and on the ability of the Commission to exercise effectively its expressly granted regulatory jurisdiction.

Since the court below based its ruling on its interpretation of the "production or gathering of natural gas" exemption in Section 1 (b), we shall deal with this question first. We show in Point I that the court read the statute incorrectly. The court failed to consider the exemption's purpose, its relation to the text of other provisions of the Act and its legislative history, all of which clearly demonstrate that the exemption is limited in both scope and purpose and was not intended to deny the Commission such authority as would be necessary to regulate natural-gas companies effectively. We show that jurisdiction over dispositions of gas reserves is, in at least some circumstances, necessary to effective exercise of the Commission's admitted powers, and hence that it was authorized to investigate and take such action with respect to this transaction as the facts might warrant.

In Point II, we show that, under familiar principles governing the relationship of courts and administrative agencies in effectuating the legislative policy, the injunctive assistance requested by the Commission, either under Section 20 (a) of the Natural Gas Act or under a court's general equity powers, should have been granted readily and in a spirit of cooperation, in order to enable

the Commission to complete its administrative inquiry and to determine whether the facts unearthed by the investigation called for any Commission action. Finally, we discuss the claim of Panhandle's stockholders—rejected by the court below—that the transaction had gone too far to be enjoined and demonstrate that this claim is without foundation.

I

THE COURT BELOW ERRED IN HOLDING THAT THE NATURAL GAS ACT ON ITS FACE WITHHOLDS FROM THE COMMISSION JURISDICTION OVER EVERY CONCEIVABLE DISPOSITION OF NATURAL-GAS RESERVES

Section 1 (b) of the Act specifically excludes from the jurisdiction of the Commission (1) "the local distribution of natural gas" (2) or "the facilities used for such distribution" (3) or "the production or gathering of natural gas." Admittedly, neither of the first two exclusions is involved here—there is no question as to the local distribution of natural gas or the facilities used for such distribution. The holding below that the Commission is without authority to regulate transfers of gas reserves by natural-gas companies, regardless of the facts, circumstances, purposes or adverse effects on effective regulation, is based primarily—and respondents likewise rely most heavily (Panhandle Br. in Opp., pp. 4-5; Kansas Br. in Opp., pp. 6-9)—on the proposition that gas reserves fall within the exemption in Section 1 (b) of the Act, excluding "production or

gathering of natural gas" from the jurisdiction otherwise vested by the Act in the Commission. The court below held (R. 76-77):

It would certainly seem from the first half dozen readings of these exclusionary words in the statute that Congress has pretty clearly taken out from its operation and left to state regulation [citing cases and state statutes] the subject-matter of the Panhandle-Hugoton transaction.

* * * It is pretty hard to see why such leases are not facilities used in the production of natural gas. The word "facilities" has a pretty wide meaning as one looks it up in the dictionary and a glance at the use of the term in court decisions indicates no narrowing of the breadth of the term. We have no reason to think that Congress meant it to be narrowly applied here.

By reading the term "facilities" as applying to the "production or gathering" exemption, the court below erroneously disregarded the text of the provision which clearly shows that the term "facilities" is applicable only to "local distribution of natural gas," and is inapplicable to "production or gathering." Moreover, the court below attempts to define the scope of the exemption merely by reference to the words of the exemption as set out in Section 1 (b); if the court had referred to the purpose of the exemption, as manifested in other provisions of the Act as well as in the legislative

history, the error of its construction would have been patent. As a consequence of its failure to go beyond what it deemed to be the clear words of the statute, the Court of Appeals' reading of the exemption is unduly broad, and creates substantial gaps in the comprehensive scheme of complementary regulation, state and federal, which, as this Court has recognized, Congress intended to establish in enacting the Natural Gas Act.

A. THE "PRODUCTION OR GATHERING OF NATURAL GAS" EXEMPTION IS LIMITED IN SCOPE. IT IS INTENDED SOLELY TO PRESERVE STATE REGULATORY POWERS, AND NOT TO CREATE GAPS IN THE COMPREHENSIVE REGULATORY SCHEME ESTABLISHED BY THE ACT

1. The Natural Gas Act shows on its face that the "production or gathering" exemption was not intended to extend to all phases of production or gathering and everything related thereto, or to deprive the Commission of jurisdiction over the production and gathering properties or facilities of a natural gas company where such jurisdiction is necessary for effective regulation and where there is no conflict with local regulation. This is clear from the specific exemptions set out in Section 1 (b), of "the local distribution of natural gas or the facilities used for such distribution or the production or gathering of natural gas." The absence of any exemption for facilities used for production or gathering, comparable to that provided for local distribution facilities, shows that,

even on the face of Section 1 (b), the exemption embraces only the *activities* of production and gathering and not the *facilities* used therefor.

In addition, the Act contains numerous provisions affirmatively vesting jurisdiction in the Commission in regard to both production and gathering properties and gas reserves. Thus, Section 6, which is related to the Commission's rate-making powers, extends to all the property of a natural-gas company; subsection (a) authorizes the Commission to "investigate and ascertain the actual legitimate cost of the property of every natural-gas company, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation and the fair value of such property," and subsection (b) requires every natural-gas company, upon request, to file with the Commission "an inventory of all or any part of its property and a statement of the original cost thereof."

Similarly, Section 8 (a), in authorizing the Commission to prescribe uniform and correct accounting for natural-gas companies, extends to all the property of such companies.⁸ Under Sec-

⁸ Section 8 (a) of the Act is identical with and was taken from Section 301 (a) of the Federal Power Act. In reporting out the latter, the Senate Committee on Interstate Commerce stated (S. Rep. No. 621, 74th Cong., 1st Sess., p. 53) that "the authority of the Commission over the accounts of companies under its jurisdiction extends to the entire business of such companies."

tion 9 (a), the Commission is authorized to determine, and to fix by order the proper and adequate rates of depreciation and amortization "of the several classes of property of each natural-gas company used or useful in the *production*, transportation, or sale of natural gas."

Furthermore, Section 10 (a) authorizes the Commission to require natural-gas companies to file reports giving full information as to assets and liabilities as well as the cost of maintenance and operation "of facilities for the *production*, transportation, or sale of natural gas."

Section 5 (b) provides that the Commission "may investigate and determine the cost of the *production* or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas."

Finally, Section 14 (b) authorizes the Commission, after hearing, to determine "the adequacy or inadequacy of the gas reserves held or controlled by any natural-gas company * * *;

and [the Commission] may also, after hearing, determine the propriety and reasonableness of the inclusion in operating expenses, capital, or surplus of all *delay* rentals or other forms of rental or compensation for unoperated lands and leases." It further provides that the Commission, for purposes of such determinations, may require each natural-

* Unless otherwise indicated, the italics in this brief are supplied.

gas company to file copies of "all its leases and royalty agreements with respect to such gas reserves."

These provisions, relating as they do to various controls of the Commission in regard to facilities used for production and gathering, make it clear that the Section 1 (b) exemption is not all-inclusive, extending to all phases of production and gathering. And they plainly show that Congress' failure to include "facilities used for" production and gathering when it wrote the Section 1 (b) exemption was not a careless inadvertence. Rather, that omission was the product of a purpose to confer a certain measure of authority upon the Commission with respect to such facilities, depending on what the facts found by the Commission may require.

2. The legislative history of the Act further reveals the narrow scope of the production and gathering exemption and the interrelationship of this exemption to the general grant of Commission jurisdiction. At the outset, it should be noted that the primary purpose of the Act was effectively to regulate interstate transportation and sale of natural gas in interstate commerce for resale, which this Court had made plain (*Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U. S. 83; *Missouri v. Kansas Natural Gas Co.*, 265 U. S. 298) were not subject to state regulation. As was stated by the House Committee in reporting the bill which became the Nat-

ural Gas Act: "The basic purpose of [the Act] is to occupy this field in which the Supreme Court has held that the States may not act. * * *

Your committee believes that this legislation is highly desirable to fill the gap in regulation that now exists by reason of the lack of authority of the State commissions." Report of House Committee on Interstate and Foreign Commerce on H. R. 6586, H. Rep. 709, 75th Cong., 1st sess., pp. 2, 3;¹⁰ see, also, H. Rep. 2651, 74th Cong., 2d sess., pp. 1-3.

As to the "production or gathering" exemption, it is significant that the versions of the natural-gas legislation proposed prior to 1936 contained no such provision.¹¹ In 1935 this Court

¹⁰ This report was incorporated verbatim in the Report of the Senate Committee on Interstate Commerce. S. Rep. 1162, 75th Cong., 1st sess., accompanying H. R. 6586.

¹¹ H. R. 11662, 74th Cong., 2d sess., which was different from the law as enacted in its jurisdictional provisions and resembled the 1935 bills did not contain the exemption in its present form but did exempt "The production of natural gas." The phrase "production or gathering" appeared for the first time in H. R. 12680, introduced in the House of Representatives on May 12, 1936, by Representative Lea of California. The Report of the House Committee on Interstate and Foreign Commerce on that bill (H. Rep. 2651, 74th Cong., 2d sess.) states (p. 3):

"Subsection (b) confers jurisdiction upon the Commission over the transportation of natural gas in interstate commerce and the sale of such gas for resale to the public but does not apply to any other sale of natural gas, or deprive a State of any lawful authority now exercised over the distribution and sale of natural gas locally; and exempts from the jurisdiction of the Commission the sale of natural gas for industrial use only."

had held unconstitutional certain attempted federal regulation in the field of conservation of oil under the National Industrial Recovery Act. *Panama Refining Co. v. Ryan*, 293 U. S. 388. This was followed by the enactment of the Connally "Hot-Oil" Act in 1935 (49 Stat. 30; 15 U. S. C. 715-715(1)), and its amendment in 1937 (50 Stat. 257) which was aimed at making effective state proration and other laws relating to conservation or production of oil. The 1937 amendment was under consideration by Congress at the same time as the proposed natural-gas legislation and the status of the conservation problem at the time doubtless influenced the insertion of the "production or gathering" exemption in the Act as finally enacted. And in commenting on the exemption as it appeared in H. R. 6586, the Committee stated (H. Rep. 709, 75th Cong., 1st sess., pp. 2-3):

In view of the importance of section 1 (b), which states the scope of the act, it seems advisable to comment on certain provisions appearing therein. It will be noted that this subsection of the bill, after affirmatively stating the matters to which the act is to apply, contains a provision specifying what the act is not to apply to, as follows: "but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribu-

tion or to the production or gathering of natural gas."

The quoted words are not actually necessary, as the matters specified therein could not be said fairly to be covered by the language affirmatively stating the jurisdiction of the Commission, but similar language was in previous bills, and, rather than invite the contention, however unfounded, that the elimination of the negative language would broaden the scope of the act, the committee has included it in this bill. That part of the negative declaration stating that the act shall not apply to "the local distribution of natural gas" is surplusage by reason of the fact that distribution is made only to consumers in connection with sales, and since no jurisdiction is given to the Commission to regulate sales to consumers the Commission would have no authority over distribution, whether or not local in character.

Thus, the legislative history clearly demonstrates that Congress was seeking to bridge the gap revealed by the *Attleboro* case and to occupy the entire field in which this Court had held the states could not act. See *infra*, pp. 34-36. It further demonstrates that Section 1 (b) exemptions were not intended to curtail the Commission's power over matters of national concern, but rather to preserve to the states the areas in which it had been previously held they could

operate. Cf. *Pennsylvania Gas Co. v. Public Service Comm.*, 252 U. S. 23.

3. Recognizing the exemption's limited purpose, this Court has attributed to the "production or gathering" exemption a scope far narrower than the "pretty wide meaning" ascribed by the court below and has recognized that as an "exception to the primary grant of jurisdiction in the section [the exemption is] to be strictly construed." *Interstate Natural Gas Co. v. F. P. C.*, 331 U. S. 682, 690-691; *Colorado Interstate Gas Co. v. F. P. C.*, 324 U. S. 581; *Panhandle Eastern Pipe Line Co. v. F. P. C.*, 324 U. S. 635; *F. P. C. v. Hope Natural Gas Co.*, 320 U. S. 591; *F. P. C. v. Natural Gas Pipeline Co.*, 315 U. S. 575; cf. *Panhandle Eastern Pipe Line Co. v. Public Service Commission*, 332 U. S. 507; see, also, *Hartford Electric Light Co. v. F. P. C.*, 131 F. 2d 953, 962 (C. A. 2), certiorari denied, 319 U. S. 741. This recognition not only accords with the Act's legislative history, but also adheres to "the elementary rule requiring that exceptions from a general policy which a law embodies should be strictly construed, that is, should be so interpreted as not to destroy the remedial process intended to be accomplished by the enactment." *Spokane & Inland R. R. v. United States*, 241 U. S. 344, 350; *Piedmont & Northern Ry. Co. v. Comm'n*, 286 U. S. 290, 311-312; *United States v. McElvain*, 272 U. S. 633, 639; see, also, *Hartford Electric Light Co. v. F. P. C.*, 131 F. 2d 953, 962 (C. A. 2),

certiorari denied, 319 U. S. 741; *People's Natural Gas Co. v. F. P. C.*, 127 F. 2d 153 (C. A. D. C.).

In accordance with the narrow scope properly to be ascribed to the production and gathering exemption, this Court in the *Colorado Interstate* and *Panhandle* cases rejected the companies' contention that the exemption precluded the Commission from considering their production and gathering properties in passing on the reasonableness of their rates. It held, notwithstanding the exemption, that the Commission could include production and gathering properties in the rate base at original cost, and the cost of producing and gathering natural gas in the operating expenses. See, also, *F. P. C. v. Hope Natural Gas Co.*, 320 U. S. 591, 607-609. And in the *Interstate* case, the Court unanimously held the sale of natural gas made in the field by a producer to a natural-gas company, which in turn transported the gas so purchased to out-of-state markets, was subject to the Commission's jurisdiction. Here again, the principal contention advanced by the company was that the sales involved related to production and gathering of natural gas and hence fell within the ambit of the Section 1 (b) exemption, and here again this Court rejected that contention, 331 U. S. 682.

In discussing the "production or gathering" exemption in these cases, the Court pointed out that, in denying the Commission jurisdiction to regulate the production and gathering of natural

gas, "it was not the purpose of Congress to free companies from effective public control. The purpose of that restriction was, rather, to preserve in the States powers of regulation in areas in which the States are constitutionally competent to act. Thus the House Committee Report states: 'The bill takes no authority from State commissions, and is so drawn as to complement and in no manner usurp State regulatory authority.' * * * Clearly, among the powers thus reserved to the States is the power to regulate the physical production and gathering of natural gas in the interests of conservation or of any other consideration of legitimate local concern." *Interstate* case at 690; see, also, *Colorado Interstate* case at 602-603.

In recognizing the limited scope of the Section 1 (b) exemption, the Court has sought to give effect to the purpose of the Natural Gas Act to provide for a completely comprehensive system of complementary federal and state regulation. "The Natural Gas Act created an articulate legislative program based on a clear recognition of the respective responsibilities of the federal and state regulatory agencies. It does not contemplate ineffective regulation at either level. We have emphasized repeatedly that Congress meant to create a comprehensive and effective regulatory scheme, complementary in its operation and in no manner usurping their authority. *Public Utilities Comm'n v. Gas Co.*, 317 U. S. 456, 467;

Power Comm'n v. Hope Gas Co., 320 U. S. 591, 609-610; *Interstate Gas Co. v. Power Comm'n*, 331 U. S. 682, 690. And, as was pointed out in *Power Comm'n v. Hope Gas Co.*, *supra*, at 610, "the primary aim of this legislation was to protect consumers against exploitation at the hands of natural gas companies." The scheme was one of cooperative action between federal and state agencies." *Panhandle Eastern Pipe Line Co. v. Public Service Comm'n*, 332 U. S. 507, 532.

The foregoing demonstrates, we submit, that the "production or gathering of natural gas" exemption has a limited scope, extending only to the activities of production and gathering. It further demonstrates that the purpose of the exemption was to preserve to the states areas of control in which they are competent to act and not to leave a gap in the comprehensive system of dual regulation of natural-gas companies.

B. COMMISSION JURISDICTION OVER TRANSFERS OF GAS RESERVES IS FOUNDED ON SPECIFIC PROVISIONS OF THE NATURAL GAS ACT, IS CONSISTENT WITH THE SECTION 1(b) EXEMPTIONS, AND ACCORDS WITH THE PURPOSE OF THE ACT

When the "production or gathering of natural gas" exemption is read in accordance with its limited scope and purposes, it becomes clear that the exemption was not intended to deny to the Commission jurisdiction over a disposition of gas reserves, if the facts which the Commission might find should require some regulatory ac-

tion. Such jurisdiction does not conflict with matters of local concern, left to state regulation and control, and is essential for effective regulation by the Commission on a national scale in accordance with the purpose of the Natural Gas Act.

1. Contrary to the impression of the court below (R. 76), the states do not attempt to regulate the transfer or disposition of gas leases or reserves. While several states, such as the State of Kansas where the gas reserves here involved are located, have statutes relating to proration and conservation of natural gas for the purpose of preventing uneconomic development and waste of this natural resource, none of these statutes attempts to regulate the transfer of gas leases. See, *e. g.*, Kansas Gen. Stat., c. 57, §§ 701-713 (Supp. 1947); Mich. Stat. Ann., c. 97 (Supp. 1947); Okla. Stat. Ann., Tit. 52, c. 3, §§ 231-247; Texas Rev. Civ. Stat., Tit. 102, § 6008 *et seq.* (Vernon 1925 with Supp. 1948); see also La. Gen. Stat., Secs. 4766-4826.2; cf. *Interstate Natural Gas Co. v. F. P. C.*, 331 U. S. 682, 691.

Nor does the Kansas State Corporation Commission which has intervened in this proceeding claim such power. In its petition for leave to intervene in the court below, it stated that it had the duty to regulate the taking of natural gas in order to prevent waste and to achieve "the orderly development in and of any common source

of supply" (R. 70) and that in accordance therewith, it issues monthly proration orders regulating the production of natural gas from the Kansas Hugoton field (R. 71). The State Commission further stated it has "encouraged" the free interchange of leases as "it helps to prevent undeveloped islands of productive acreage and is an important factor in securing orderly development" of the field (R. 72). And in this Court, that commission has asserted only that "It has no more than an observer's interest in the stock transfers * * *. It is deeply concerned with the jurisdictional questions relating to the transfer by Panhandle to Hugoton of gas and gas-and-oil leases covering acreage in the Kansas Hugoton Field" (Br. in Opp., p. 4). Such "encouragement" and "deep concern" fall far short of a claim or assertion of a right on the part of the State Corporation Commission to regulate or control the transfer of gas reserves and leases. Accordingly, there is no conflict or interference with the exercise by the state of a lawful regulatory function. Cf. *Interstate Gas Co. v. F. P. C.*, 331 U. S. 682, 690, 694-692.

2. The existence of Commission control over a natural-gas company's disposition of its gas reserves is necessary for effective regulation from several different aspects. The absence of such jurisdiction would result in substantial gaps in the comprehensive regulatory scheme of the nat-

ural-gas industry envisaged by Congress.¹² At this point it should be observed that the Commission is not now claiming that the disposition of the reserves here involved would necessarily have adverse effects on Commission regulation. The effect of the disposition of these reserves will not be ascertainable until after the facts and evidence in regard thereto have been developed in the course of the investigation in aid of which the Commission is here seeking judicial assistance.

(a) Commission control over a natural-gas company's disposition of its gas reserves is clearly within its authority under Section 7 (b) of the Natural Gas Act. That Section provides:

No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available sup-

¹² The Commission's disclaimer of control over production and gathering quoted by the court below (R. 78) merely paraphrases the statutory language and was not broader in scope than the statutory exemption itself. Similarly, the statement below that "It has been the practice in the natural gas industry for companies to trade freely in gas leases, and the Commission has never heretofore asserted the right to regulate transfers of such leases" (R. 78) does not reflect the full picture. Until this time, such trading has taken place with the view of blocking in reserves and improving service (R. 72), and so far as the Commission is presently aware, not to achieve results which would derogate from the Commission's jurisdiction. See pp. 35-53.

ply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

Inasmuch as natural gas is the lifeblood of a natural-gas system and its availability is fundamental to the continued operation of a natural-gas company, control over the company's disposition of its gas reserves is essential to prevent a company from abandoning service "without the permission and approval of the Commission first had and obtained." If the Commission lacks such power, a company may, by disposing of its gas reserves, disable itself from rendering service and thereby, for all practical purposes, abandon service in whole or in part without Commission approval, contrary to the mandate of Section 7 (b). The result would be at least a substantial limitation on the Commission's control over abandonments of service.¹³

¹³ The 96,000 acres here involved are estimated to contain 500 billion cubic feet of natural gas, which is about 12% of the estimated 6,000 billion cubic feet of gas reserves owned or controlled by Panhandle (R. 27). Panhandle, however, says that the transfer will result in a net decrease in its reserves of less than 5%. This is apparently based on the assumption that Panhandle in 1965 will exercise its option to purchase from Hugoton the 400 billion cubic feet of gas which the Panhandle-Hugoton contract contemplated would then remain. *Supra*, p. 6. But whether the 400 billion cubic feet would then remain or be then divertible to Panhandle depends on the needs of the Kansas Power & Light Company, which Hugoton contracted to supply (*supra*, p. 6), and the require-

(b), (i) Control over a natural-gas company's disposition of its gas reserves is necessary to enable the Commission to prevent a natural-gas company from repudiating its dedication of such gas reserves to the discharge of its obligations as a public utility. Under Section 7 (e) of the Act the Commission is required to issue a certificate of public convenience and necessity for the construction or extension of natural-gas facilities to any qualified applicant "if it is found [among other things] that the applicant is able and willing properly to do the acts and to perform the service proposed * * *." Since, as we indicated, *supra*, ability to serve is dependent largely upon the availability of natural gas, the Commission, to determine whether an applicant is qualified and able and willing properly to do the acts, has required, as authorized by Section 7 (d), that applicants for such certificates show "the gas reserves which are to supply the market which is proposed to be served." See *supra*, p. 5.¹⁴ In compliance with this requirement, Panhandle has, in hearings on three applications for certificates of public convenience and necessity seeking augmentments of the state regulatory commission. In any case, the proportion of Panhandle's total reserves represented by the acreage here involved is irrelevant in the present posture of the case. The factor becomes material only on the substantive question of whether the transfer should be permitted if and when it be held that the Commission does have jurisdiction over such transactions.

¹⁴ The Commission has denied certificate applications because of inadequate reserves.

thority to construct additional facilities costing about \$57,000,000, included most of the acreage here involved in support of its claim that it had natural-gas reserves adequate to justify the issuance of the certificates sought. F. P. C. Dockets G-706 and G-876; *supra*, pp. 4-5. These certificates were issued upon the finding by the Commission based on these representations that Panhandle had adequate reserves to warrant its expansion. 5 F. P. C. 544, 546, 949, 952 (F. P. C. Docket No. G-706, orders of June 4, 1946, and of November 30, 1946); F. P. C. Docket G-876, order of June 10, 1948, *supra*, p. 5.

Not only were these reserves used to support Panhandle's applications for certificates of convenience and necessity, but Panhandle has also, in the course of the Commission's investigation into the reasonableness of its rates in 1942, represented most of these reserves as "used and useful property" and hence includible in its rate base. Based on these representations, the Commission has permitted these reserves to be included in Panhandle's rate base as "used and useful property," on which Panhandle has since been entitled to and has received a return. Panhandle has also been reimbursed by consumers in excess of \$665,000 for the expenses of holding these reserves.

By so listing these reserves in support of its applications for certificates of convenience and necessity and by so representing them as "used

and useful property" in the rate proceeding, Panhandle has devoted or dedicated, in accordance with long-established principles of public utility law, these reserves to serve the public, that is, to the discharge of Panhandle's public utility obligations, particularly those for the discharge of which the company in its applications for certificates of public convenience and necessity has represented that these reserves would be available. *Martin v. Illinois*, 94 U. S. 113; *Wolff Co. v. Industrial Court*, 262 U. S. 522, 535; *Tyson & Bro. v. Banton*, 273 U. S. 418, 432, 433-434; *Stinson Lumber Co. v. Kuykendall*, 275 U. S. 207, 211; *Ribnik v. McBride*, 277 U. S. 350, 355; *Williams v. Standard Oil Co.*, 278 U. S. 235, 239-240; *United Fuel Gas Co. v. R. R. Comm'n*, 278 U. S. 300, 308, 309; *Georgia Banking Co. v. Smith*, 128 U. S. 174, 179-180; *Cincinnati v. White*, 6 Pet. 431, 439; *Miss. R. R. Comm'n v. Mobile & Ohio R. R. Co.*, 244 U. S. 388, 390-391; cf. *Michigan Commission v. Duke*, 266 U. S. 570, 577.¹⁵

¹⁵ Accord: *City of Phoenix v. Kasun*, 54 Ariz. 470, 475; *Western Canal Co. v. Railroad Commission*, 216 Cal. 639, 647; certiorari denied, 289 U. S. 742; *Stoehr v. The Natatorium Co.*, 34 Idaho 217, 221-222; *State ex rel. Helm v. Trego County Co-op Tel. Co.*, 112 Kan. 701; *Brooklyn Union Gas Co. v. City of New York*, 50 Misc. 450, 456-457; *Industrial Gas Co. v. Pub. Util. Comm'n*, 135 Ohio St. 408; *Okla. Natural Gas Co. v. Corporation Comm'n*, 88 Okla. 51; *Western Union Tel. Co. v. Cartor*, 93 Okla. 269; *Public Utilities Commission v. East*

The refusal of the court below to hold this common-law characteristic of a public utility applicable to these gas reserves was predicated on the ground that the dedication theory, if applicable, would extend also to outworn trucks and obsolete drilling machines (R. 79). Aside from the fact that the court below was laboring under the misapprehension that the term "facilities" applied to "production or gathering" as well as to local distribution, its refusal also evidenced a complete failure to appreciate the vast difference in importance between such equipment and natural gas in the operation of a natural-gas pipeline system. Whether such a differentiation should be made and its significance in the context of natural gas regulation, are, we submit, for the Commission to investigate and decide, and not the courts below. Some equipment may be merely incidental to the operation of a natural-gas company. Unlike gas reserves, trucks and drilling machines need not be detailed in an application for a certificate of public convenience and necessity. Moreover, in sharp contrast to such equipment, natural gas, as we have already indicated, *supra*, pp. 36-37, is the lifeblood of a natural-gas company. Indeed, the availability of gas determines the very existence and operation of the

Providence Water Co., 48 R. I. 376, 392; *Rural Elec. Co. v. Bd. Equalization*, 57 Wyo. 451, 471-472; *Wyman, Public Service Corporations* (1911), pp. 167 *et seq.*; Recent Case Note, 89 U. of Pa. L. Rev. 1107.

company.¹⁶ While the physical life of a pipe line is comparatively long (60 years or more), gas reserves are exhaustible in a much shorter period, with the result that the service life of a natural-gas company's facilities is limited by the life of its gas reserves. Cf. *F. P. C. v. Natural Gas Pipeline Co.*, 315 U. S. 575, 597.

(ii) That the Commission has power to enforce the public-utility obligations thus undertaken by Panhandle as to these reserves, *i. e.*, to use them for the purpose of rendering adequate service at reasonable and nondiscriminatory rates, is plain. Not only is Section 16 of the Natural Gas Act, empowering the Commission "to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act" sufficiently broad to vest this power in the Commission, but the provisions of the Act authorizing the Commission to grant certificates of public convenience and necessity as well as investigate the reasonableness of a natural-gas company's rate implicitly grant such

¹⁶ The Congressional recognition of the fundamental importance of natural gas to a natural-gas company is manifest from Section 14 (b). That Section authorizes the Commission after hearing to "determine the adequacy or inadequacy of the gas reserves held or controlled by any natural-gas company." It further provides that "For the purpose of such determinations, the Commission may require any natural-gas company to file with the Commission true copies of all its lease and royalty agreements with respect to such gas reserves."

ancillary authority to the Commission. See also Sections 4 (b), 5 (a); cf. *Interstate Commerce Commission v. Illinois Central R. Co.*, 215 U. S. 452; *United Fuel Gas Co. v. R. R. Comm'n*, 278 U. S. 300. As noted by the Court of Appeals for the Seventh Circuit, "Like other legislation of this character, [the Act] should be liberally construed and interpreted, so as to embrace, within its scope, the implied powers necessary to an exercise of the expressly granted powers." *Natural Gas Pipeline Co. v. F. P. C.*, 120 F. 2d 625, 632.¹⁷ While this Court reversed the judgment in that case, it affirmed the holding of the Court of Appeals that the Commission had implicit power to enter interim rate orders. "Since such an order may be in the interests of the public, as well as the regulated company, and is in harmony with the purposes of the Act, it is one which the Commission has discretion to make under Section 16 as appropriate to carry out the provisions of the Act." *F. P. C. v. Natural Gas Pipeline Co.*, 315 U. S. 575, 585; cf. *California v. United States*, 320 U. S. 577, 582-584.

The legislative history of the 1942 amendment to the Act supports the existence of the implicit power in the Commission at least to enforce a

¹⁷ See *United States v. Kelly*, 55 F. 2d 67, 70 (C. A. 2); *Moffat Tunnel Impr. Dist. v. Denver & S. L. Ry. Co.*, 45 F. 2d 711, 723 (C. A. 10), certiorari denied, 283 U. S. 837; cf. *McGrain v. Daugherty*, 273 U. S. 135, 173; *The Employers' Liability Cases*, 207 U. S. 463, 495; *Legal Tender Cases*, 12 Wall. 457, 550.

natural-gas company's obligation to render adequate service. As introduced in the House of Representatives and referred to the House Committee on Interstate and Foreign Commerce, that amendment which adds several subsections to Section 7 and enlarges the Commission's certificate power (H. R. 5249, 77th Cong., 1st sess.) contained a subsection (h) providing:

Nothing contained in this section shall be construed to affect the authority of a State within which natural gas is produced to authorize or require the construction or extension of facilities for the transportation and sale of such gas within such State: *Provided, however,* That the Commission, after a hearing upon complaint or upon its own motion, may by order forbid any intrastate construction or extension by any natural-gas company which it shall find will prevent such company from rendering adequate service to its customers in interstate or foreign commerce in territory already being served.

This subsection was included in the proposed amendment at the request of representatives of state regulatory commissions. These commissions had pressed "the desirability of a State having explicit authority to require or authorize gas to be served within that State to the extent that it was produced within that State; but after conferences it was felt by everyone that that power might conceivably be used to cut off inter-

state service * * *, and therefore, to meet that situation a proviso was added" (Hearings before House Committee on Interstate and Foreign Commerce on H. R. 5249, 77th Cong., 1st sess., p. 7).

The Commission took no position as to the desirability of this subsection. It expressed the view at the Committee hearings (*supra*, at p. 22) that if the Committee did

* * * strike out [the two parts of subsection (h)] * * * the Commission will have power under the existing statute to require the maintenance of adequate service in interstate commerce, just as much as it would under this proposed language in the latter part of (h), even though it is not so explicitly spelled out.

The Committee in its report recommending the passage of H. R. 5249 plainly adopted this view of the Commission's implicit powers. It omitted subsection (h), made minor changes in other subsections, and commented (H. Rep. No. 1290, 77th Cong., 1st sess., pp. 4-5):

* * * It is believed that the meaning of the bill, with these changes, is substantially the same as before and that the jurisdiction of the Commission is substantially unchanged by the amendments; but there is clearer protection to the existing jurisdiction of State utility commissions over intrastate matters and the amended language on pages 1 and 2 conforms to the language of the provision

relative to abandonment in section 7 (b) of the Natural Gas Act.

It is believed that the bill, with the committee amendment striking out subsection (h), provides adequate legislation for the present on the subject of certificates of public convenience and necessity. * * *

The Senate Committee on Interstate Commerce recommended that the bill be passed without further amendment (S. Rep. No. 948, 77th Cong., 2d sess.) and the bill was so enacted. 56 Stat. 83.¹⁸ See, also, Hearings on H. R. 11662, 74th Cong., 2d Sess., p. 92 (Testimony of John Benton, General Solicitor, National Association of Railroad and Utility Commissioners).

In this connection, it should be noted that the present proceeding is not the first in which this power to protect the adequacy of service in interstate commerce has been exercised by the Commission. In *Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co.*, C. A. 6,

¹⁸ It is interesting to note in this connection that the transfer proposed by Panhandle even when viewed as the company claims it should be (R. 49) parallels and, indeed, is practically the same as the situation dealt with in subsection (h). According to the affidavit of William G. Maguire, the Chairman of Panhandle's Board of Directors, the proposed transfer to Hugoton is for the purpose "of supplying an adequate quantity of gas produced in Kansas for the people of Kansas" (R. 49). Since this result is to be achieved by diverting to purely intrastate service natural gas dedicated to the discharge of Panhandle's obligation of rendering adequate service as a "natural gas company," the present situation differs from that of subsection (h) only in that here Panhandle is

No. 10834 (decided April 7, 1949), the Court of Appeals for the Sixth Circuit refused to order specific performance of Panhandle's contracts to deliver certain quantities of natural gas to Michigan Consolidated in face of the Commission's order directing curtailed deliveries in order to allocate the inadequate gas available. In holding that such matters were committed by the Natural Gas Act to the exclusive jurisdiction of the Commission, the court stated (slip opinion, p. 7):

* * * adequacy and impartiality of service, in the light of existing circumstances, is within Commission control. This must be so if control over rates means anything; since adequate service is a necessary concomitant in the fixing of reasonable rates. If this is so in respect to private utilities it must be even more important in the case of utilities which are affected with a public interest. If the Commission has no authority to order adequate service to customers, in view of all the conditions and circumstances involved, the basic purpose of the Natural Gas Act fails of realization.

And in *City of Detroit v. Panhandle Eastern Pipe Line Co.*, 5 F. P. C. 43, 63 PUR(NS) 213, the

attempting to achieve the diversion voluntarily, and not pursuant to the order of the state regulatory agency. If the Commission has power to prevent a state regulatory agency from requiring such diversion, it *a fortiori* may prevent a natural-gas company from voluntarily diverting the gas.

Commission ordered Panhandle not to make a contract for the direct sale of natural gas to a new industrial consumer where the sales might result in inadequate service in regard to sales subject to the Commission's jurisdiction. The Commission there stated that it—

* * * wished to make it plain that its action in this matter is not to be construed as an attempt to assert jurisdiction over a direct sale of gas as such. However, we do by our action in this matter indicate clearly that, in our opinion, the Natural Gas Act does confer on the Commission jurisdiction over a company found to be a natural-gas company within the meaning of the Natural Gas Act, and over the facilities used by such company in either transporting natural gas in interstate commerce or in the sale of such gas for resale, especially to the extent necessary to enable the Commission to protect the adequacy of service to its customers.

In the instant case there can be no doubt that the entire interstate transmission pipeline system of Panhandle is subject to the jurisdiction of the Commission. Hence, it is for the Commission to determine whether it is contrary to the public interest to permit Panhandle to operate its system for the purposes proposed. If the Commission could not make this determination it would not be able to exercise properly the regulatory authority conferred upon it by Congress. That there has been a clear recognition of this authority by Panhandle is evidenced by the

several applications heretofore filed by it for permission to increase its system sales capacity.

Therefore, it is our view that where, as here, a company has not the capacity to sell a large quantity of gas to a new customer without impairing its ability to render satisfactory service to existing customers, it is the duty of the Commission in protecting the interest of the public to prevent such company from using the facilities subject to its jurisdiction for such purpose. * * *

The absence of such implicit power in the Commission, particularly in the situation where, as here, the reserves being disposed of were presented in support of applications for certificates of public convenience and necessity to show that the applicant was able adequately to serve, would render ineffective Commission jurisdiction over construction and extension of facilities. If an applicant for a certificate could, free of any Commission control, dispose of its gas reserves immediately after the certificate was issued, the Commission's findings as to ability to perform would be without substance or meaning the moment after they were made. These findings would be, for all practical purposes, valueless; and the controls which Congress intended the Commission to exercise through its certificate power would largely be futile.

(c) Finally, Commission control over a natural-gas company's disposition of its gas reserves is

essential to protect its rate-making functions as approved by this Court in the *Hope, Colorado Interstate* and *Panhandle* cases. In the *Hope* case, as in the earlier *Natural Gas Pipeline* case (315 U. S. 575), this Court held that the Act did not bind the Commission to the use of any single formula or combination of formulae in determining rates and that the Commission had discretion to determine which, if any, formula to use, and to make the necessary pragmatic adjustments (320 U. S. 591 at 602). Noting that the primary aim of the Natural Gas Act was "to protect consumers against exploitation at the hands of natural-gas companies" (320 U. S. at 610), and that the fixing of "just and reasonable" rates involves a balancing of the investor and consumer interests (320 U. S. at 603), the Court there approved as nonconfiscatory a rate-reduction order of the Commission grounded on a rate base which included the company's production and gathering facilities at original cost. In the *Colorado Interstate* and *Panhandle* cases, this Court explicitly affirmed that the Commission, in using the rate-base method of fixing just and reasonable rates, could include the company's production and gathering facilities at original cost in the rate base.¹⁹

¹⁹ The Court there commented (324 U. S. at 601): "Congress of course might have provided that producing or gathering facilities be excluded from the rate base and an allowance be made in operating expenses for the fair field price of

Just as the Commission has implicit power over a natural-gas company's disposition of its gas reserves to enforce the company's obligation to furnish adequate service (*supra*, pp. 42-43), so too, we submit, it has implicit authority over such disposition in order to protect its rate-making functions as defined in the *Colorado Interstate* group of cases. The power so to protect its jurisdiction in the interest of the public and in harmony with the purposes of the Act is a power "necessary or appropriate to carry out the provisions of this Act," vested in the Commission by Section 16. Cf. *F. P. C. v. Natural Gas Pipeline Co.*, 315 U. S. 575, 585.

Thus, such power may be implied as necessary to the exercise of the expressly granted rate-making powers in Sections 4 and 5, for if the evidence developed at the Commission's proposed investigation supports the claim that Panhandle's sole purpose in transferring the gas reserves here involved to its creature Hugoton is to avoid regulation of the earnings from the sale of gas produced and gathered from these reserves and that Hugoton is only the start of Panhandle's endeavor to realize additional and unregulated profits for its stockholders from its gas reserves (R. 37), the Commission, without such ancillary power, would be unable to prevent dispositions of gas reserves the gas as a commodity. Some have thought that to be a wiser course. But we search the Act in vain for any such mandate."

for these purposes. As a result, the Commission's power to include a natural-gas company's production and gathering facilities in the rate base at original cost, would, for all practical purposes, be thwarted, and the Commission would be unable to strike a proper balance between investors' and consumers' interests in thus fixing just and reasonable rates. Cf. *Hope* case at 603.²⁰

Ratewise, the effect of holding that the Commission is without power over such dispositions will be substantially to increase rates to ultimate consumers. This is evident from the fact that the Hugoton stock initially, although sold on a "when, as and if" basis, was purchased and sold at \$13.50 per share, thus reflecting a market valuation of these gas reserves which, apart from \$675,000 cash paid by Panhandle, constitute Hugoton's sole assets of about 10 million dollars.²¹ In sharp con-

²⁰ The absence of such power would, by opening a way to circumvention of the Commission's rate jurisdiction, render unnecessary any further efforts to amend the Natural Gas Act to require the Commission to exclude production and gathering facilities from the rate base, and in lieu thereof, to allow as an operating expense, "the prevailing market price" for such company-produced gas. Following the decision in the *Colorado Interstate* case, numerous bills (e. g., S. 734, S. 1028, H. R. 4051, 80th Cong., 1st sess.) directed at so amending the Act have been introduced, but to date, all such bills have uniformly failed of passage.

²¹ Of course, if the market price of the stock should increase to \$20 a share, this would represent a market valuation of approximately \$16,000,000 for the leases here involved (R.

trast to this are the facts that Panhandle originally paid only about \$160,000 for the same acreage and that since at least 1942 Panhandle has been entitled to and has received from its ultimate consumers reimbursement for the expense of maintaining these reserves. The difference between the \$10,000,000 market valuation and \$160,000 original cost represents an unearned increment, which, if the transaction is validated, will necessarily be reflected in consumer rates. The consequence of denying that the Commission had implicit power thus to protect its rate-making authority would be clearly to create a substantial gap in the comprehensive regulatory scheme of the Act and to frustrate the Congressional purpose, in enacting the Act, of protecting "consumers against exploitation at the hands of natural gas companies." *Hope* case at 610.

In summary, we respectfully submit that not only was the court below in error in holding that the Natural Gas Act on its face withheld jurisdiction from the Commission to institute an inquiry in respect of a natural-gas company's proposed disposition of its gas reserves, but, on the contrary, that a fair reading of the Act as a whole discloses a legislative intent to confer jurisdiction on the Commission to inquire into such dispositions and in appropriate circumstances to enter such order as the facts found may require.

THE DISTRICT COURT IMPROPERLY REFUSED TO GRANT THE INJUNCTION. SOUGHT BY THE COMMISSION.

We believe it clear from the foregoing that the Commission has jurisdiction to institute an inquiry into the circumstances surrounding a transfer of the gas reserves of a natural-gas company, and to take such regulatory action as the facts found should warrant. The Government submits, however, that it was unnecessary for the courts below, at this stage of the proceedings, to inquire into and decide the exact basis on which the Commission's jurisdiction can be rested. The requested injunction should have been granted on the Commission's showing that a reasonable basis for jurisdiction exists. The orderly course of the administrative proceedings should first be completed, findings of fact should be made and an appropriate order entered.²² The

²² Such limitation on the court's inquiry not only is in harmony with the principle of cooperation between the federal courts and federal administrative agencies, discussed, *infra*, pp. 65-66, but is in accordance with the established rule that the administrative agency is the judge, in the first instance, of the scope of its statutory jurisdiction. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *Macaulay v. Waterman Steamship Corp.*, 327 U. S. 540; *F. P. C. v. Arkansas Power & Light Co.*, 330 U. S. 802; *Oklahoma Press Pub. Co. v. Walling*, 327 U. S. 186; *Endicott Johnson Corp. v. Perkins*, 317 U. S. 501. This is true both where the problem before the administrative agency is factual in nature and where it

Commission may well find the facts to be such that the public interest does not require that the challenged transfer be set aside or otherwise regulated. If it should hold otherwise, a reviewing court would then have the benefit of the Commission's findings and expert conclusions. All that the Commission has asked is that the *status quo* be maintained until the orderly termination of the administrative process. The refusal of the courts below to extend this aid to the Commission, and to collaborate with the responsible administrative body in seeking to carry out the legislative mandate, is, we submit, palpably erroneous.

is a "purely legal problem" as well. In *F. P. C. v. Arkansas Power & Light Co.*, *supra*, where the Court of Appeals for the District of Columbia had refused to permit the Commission first to pass on the questions there involved on the ground that they were purely legal (156 F. 2d 821; 828), this Court reversed *per curiam*. See, also *Macauley v. Waterman Steamship Corp.*, *supra*, at 544; *Myers v. Bethlehem Shipbuilding Corp.*, *supra*, at 51, and cases cited. Moreover, the fact that the Commission, not a private litigant, was invoking judicial assistance, does not warrant departure from this rule, for the underlying reasons—comity between court and administrative agency, and desirability of orderly procedure—appear equally applicable, whether a private litigant invokes judicial process to interfere with an administrative proceeding, or, where, as here, the administrative agency seeks judicial aid to protect its proceeding. And as this Court has held, federal courts grant an administrative agency's request for assistance upon a finding of only "probable cause," where it is the agency, not a private litigant, which is seeking judicial help. *Oklahoma Press Pub. Co. v. Walling*, *supra*; *Endicott-Johnson Corp. v. Perkins*, *supra*.

A. THE DISTRICT COURT SHOULD HAVE ISSUED THE INJUNCTION TO ENFORCE THE COMMISSION'S ORDER OF NOVEMBER 10 DIRECTING PANHANDLE TO MAINTAIN THE STATUS QUO, AS AUTHORIZED BY SECTION 20 (a) OF THE NATURAL GAS ACT

The Commission in its order of November 10, 1948, after finding that good cause existed for maintaining the *status quo* pending outcome of its investigation, directed Panhandle to refrain "from paying to its stockholders, as a dividend or otherwise, such 810,000 shares of capital stock of Hugoton." Upon Panhandle's failure to notify the Commission that it would comply with this order, the Commission, invoking Section 20 (a) of the Natural Gas Act, filed its complaint in the district court seeking injunctive assistance to enforce that order. In the complaint, it was alleged, and Panhandle has never challenged the accuracy thereof, that Panhandle's "proposed and threatened" distribution of Hugoton's stock "will constitute a violation" of the Commission order of November 10 (R. 7). In these circumstances, the refusal of the district court here to grant the injunctive relief prayed was, we submit, improper.

Section 20 (a), in common with many other regulatory statutes,²³ specifically authorized the

²³ See, e. g., Clayton Act, 38 Stat. 734, 15 U. S. C., Sec. 21; Fair Labor Standards Act, 52 Stat. 1069, 29 U. S. C., Sec. 217; Federal Trade Commission Act, 38 Stat. 719, 15 U. S. C. Sec. 45 (a); Investment Company Act of 1940, 54 Stat. 842, 15 U. S. C. Sec. 80a-41; Investment Advisers Act of 1940, 54 Stat. 853, 15 U. S. C. Sec. 80b-9; National Labor Relations

Commission to seek judicial assistance to enjoin any person "engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this Act, or of any rule, regulation, or order thereunder." It farther provides that "upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond." The situation here involved falls squarely within this statutory provision, and in accordance therewith, the district court should have granted an injunction, restraining Panhandle from violating the Commission order.

The court below approved the district court's refusal to grant the injunction solely on the ground that "if it is not a valid order because beyond Commission jurisdiction, the Commission cannot have court help to enforce it. We have endeavored to set out above why we think an order interfering with the transfer of these leases would go beyond Commission authority" (R. 80). But as has been shown, *supra*, pp. 21-53, the Act does not deny the Commission jurisdiction over transfers of gas leases, where the facts found by the Commission call for some regulatory action. Accordingly, the order was not invalid, and the court below should have directed the granting of the injunction prayed for.

Act, 49 Stat. 453, 29 U. S. C. Sec. 160 (c); Securities Act of 1933, 48 Stat. 86, 15 U. S. C. Sec. 77t (b); Securities Exchange Act of 1934, 48 Stat. 899, 15 U. S. C. Sec. 78u (e).

In holding as it did, the court below explicitly rejected the other contentions advanced by Panhandle to support its claim that the Commission was not entitled to injunctive assistance under Section 20 (a). Panhandle urged that the order of November 10, 1948, was a stay or a restraining order, involving the exercise of Article III judicial power and hence was beyond the Commission's authority. That order, we submit, is within the Commission power as "necessary or appropriate to carry out the provisions" of the Act. Section 16. Moreover, the order no more involved the exercise of judicial power, let alone Article III judicial power, than a Commission order directing a natural-gas company to reduce its rates or prohibiting a company from abandoning service. These orders, of course, require the company either to act affirmatively or to refrain from doing something, and although the courts have tools at their disposal to accomplish similar results, *i. e.*, writs of mandamus, mandatory injunctions and injunctions, it does not follow that the similar administrative tools involve an exercise of Article III judicial power. In this connection, it should be noted that the Commission could not require Panhandle to comply with the order, nor could it assess penalties against Panhandle for failure to comply. Only by applying to a federal court could the Commission's order be given effect and compliance required. See *Fed. Trade Comm'n v. Claire Co.*,

274 U. S. 160, 173-174; *I. C. C. v. Brimson*, 154 U. S. 447, 485; *Western N. Y. & P. R. Co. v. Penn. Refining Co.*, 137 Fed. 343, 349 (C. A. 3), affirmed, 208 U. S. 208; *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 Fed. 567, 613 (C. C. D. Ky.), appeal dismissed, 149 U. S. 777.

Indeed, it is for this reason that the Commission instituted the present proceeding in the courts.

Panhandle further urged that the November 10 order was only interlocutory, that accordingly it was not reviewable under Section 19 (b), and hence that it was not enforceable under Section 20 (a). This contention is equally unsound. The language of Section 20 as well as that of other sections makes it clear that an order need not be reviewable under Section 19 (b) to be enforceable under Section 20 (a). Only "orders" and, even narrower, only certain "orders" satisfying prescribed requirements are reviewable under Section 19 (b). *F. P. C. v. Metropolitan Edison Co.*, 304 U. S. 375, 384.²⁴ Section 20 (a) provides

²⁴ "The context in Section 313 (b) [the Federal Power Act equivalent of Section 19 (b)] indicates the nature of the orders which are subject to review. Upon service of the petition for review, the Commission is to certify and file with the appellate court 'a transcript of the record upon which the order complained of was entered.' The statute contemplates a case in which the Commission has taken evidence and made findings. Its findings, if supported by evidence, are to be conclusive. The appellate court may order additional evidence to be taken by the Commission and the Commission may thereupon make modified or new findings. The provision for review thus relates to orders of a definitive character

for enforcement not only of orders generally but of rules and regulations as well by authorizing injunctions against "acts or practices which constitute or will constitute a violation of the provisions of this Act or of any rule, regulation, or order thereunder." In addition, Section 20 (b), authorizing the district court to issue writs of mandamus upon application by the Commission, similarly permits the issuance of these writs to enforce compliance "with the provisions of this Act or any rule, regulation, or order of the Commission thereunder." Viewed in this context, it is clear that "orders" covered by Section 20 include a much broader class of order than encompassed by Section 19 (b). Furthermore, Section 16 authorizes the issuance of "such orders, rules, and regulations as [the Commission] may find necessary or appropriate to carry out the provisions" of the Act. Clearly, the orders issued under the authority of Section 16 as "necessary or appropriate" include orders not reviewable under Section 19 (b), and certainly if these orders are to be effective, they must necessarily

dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case" (304 U. S. at 384).

Since an opportunity for a hearing, and the issuance of an order on the basis of a formal record, are prerequisites to reviewability under Section 19 (b), it is obvious that Panhandle's argument would render futile the enforcement of any order where, as here, it was necessary to obtain an immediate restraint. A summary order designed only to preserve the *status quo* is ineffective unless compliance may be enforced immediately.

be enforceable under Section 20. To the extent that valid orders issued under Section 16 be deemed not enforceable under Section 20, Commission authority under Section 16 would be a nullity. And plainly Congress did not intend such an integral part of the regulatory scheme to be thus wholly ineffectual. These various provisions, we submit, demonstrate that "orders" enforceable under Section 20 encompass more than orders which are reviewable under Section 19 (b).²⁵ Cf. *F. P. C. v. Metropolitan Edison Co.*, 304 U. S. 375, 384-386.²⁶

²⁵ This conclusion is buttressed by the fact that Section 14 (d) makes express provision for judicial enforcement of orders compelling the production of evidence, *i. e.*, subpoenas. These orders are clearly interlocutory and not reviewable under Section 19 (b). This specific provision, for judicial enforcement of such non-reviewable orders, further undermines Panhandle's contention that Congress intended only orders reviewable under Section 19 (b) to be judicially enforceable.

²⁶ *Mississippi Power & Light Co. v. Staff*, 131 F. 2d 148 (C. A. 5), relied upon by Panhandle, is unique and does not support Panhandle's position. The *Staff* case involved two attempted reviews of the actions of certain employees of the Commission. The first suit was a petition for review filed directly with the Court of Appeals for the Fifth Circuit. That was dismissed as not constituting the type of case reviewable in the first instance by the Court of Appeals. The second case was instituted in the District Court and asked for injunctive relief against the threatened wrongful acts of the Commission employees. There was no federal diversity jurisdiction as such and the suit would be maintainable only if the Federal Power Act created special federal jurisdiction. All that the Court of Appeals held was that special

B. THE DISTRICT COURT SHOULD HAVE ISSUED THE INJUNCTION IN THE EXERCISE OF ITS GENERAL EQUITY JURISDICTION

The court similarly erred in approving the district court's refusal to grant the requested injunction in the exercise of its general equity power.²⁷

This approval was predicated not on the ground that " * * * the equitable powers of the District Court are insufficient" (R. 80) but rather again on the court's holding that the Commission

federal jurisdiction was not conferred by the Power Act upon a district court of the United States to entertain a suit by a public utility to enjoin a threatened illegal action of Commission employees.

²⁷ While the Commission's complaint originally invoked only Sections 20 (a) and 22 of the Act, the Commission, during oral argument in the district court, was granted leave, with the consent of Panhandle, to invoke the jurisdiction of the court on the additional ground of its general equity powers (R. 45, 64). See *supra*, p. 8, fn. 4.

Panhandle contends that a district court may not invoke its general equity jurisdiction at the behest of the Commission because Section 20's express grant of authority to seek the aid of federal courts is exclusive and precludes granting injunctive relief on general equitable principles. This contention gives no effect to Section 22 of the Act, which provides, *inter alia* that the federal courts shall have jurisdiction of "all suits in equity and actions at law brought to enforce any liability or duty created by" the Act. Moreover, to apply here the maxim *expressio unius, exclusio alterius*, as in effect urged by Panhandle, overlooks the Commission's purpose in seeking judicial assistance here, the absence of which may have serious detrimental effects on the public interest and the Commission's regulatory jurisdiction. In such a situation, restrictive canons of statutory construction are inapplicable. *Securities and Exchange Commission v. Joiner Leasing Corp.*, 320 U. S. 344, 350.

was without jurisdiction over the transfer of any gas reserves. Since, as we have shown, *supra*, pp. 21-53, the Commission does have jurisdiction over at least some transfers of gas reserves, the court below should have reversed the district court's action and not have affirmed its refusal to maintain the *status quo* pending the outcome of the Commission's investigation as to whether the transfers here involved called for exercise of its regulatory authority.

1. It is unquestioned by the court below or by respondents that a federal court has power to assist an administrative agency to function effectively by maintaining the *status quo* pending the outcome of the agency's investigation into possible statutory violations (R. 80). The granting of interlocutory relief by a court to preserve the *status quo* pending the determination of a controversy before it or another tribunal has been a traditional form of equitable relief. *United States v. United Mine Workers*, 330 U. S. 258; *Continental Bank v. Rock Island*, 294 U. S. 648, 675-676; *Babbitt v. Dutcher*, 216 U. S. 102; *Kline v. Burke Constr. Co.*, 260 U. S. 226, 229; *Graselli Chemical Co. v. Aetna Explosives Co.*, 252 Fed. 456 (C. A. 2); *Northern Pacific Ry. v. Soderberg*, 86 Fed. 49 (C. C. D. Wash.). With the creation of administrative agencies charged with the protection of public interests and having standing to protect these interests in court, the courts similarly may assist administrative agencies. *S. E. C.*

v. U. S. Realty & Improvement Co., 310 U. S. 434; *West India Fruit & Steamship Co. v. Seatrain Lines*, 170 F. 2d 775 (C. A. 2), petition for writ of certiorari No. 432, this Term, dismissed on petitioner's motion (Journal of this Court, October Term 1948, p. 141 (February 7, 1949)); *Isbrandtsen Steamship Co. v. United States*, 81 F. Supp. 544 (S. D. N. Y.), appeal dismissed, April 4, 1949, *sub nom. Rederi v. Isbrandtsen Co., et al.*, No. 622, this Term. In the *U. S. Realty* case, a debtor corporation having liabilities in excess of \$3,000,000 and many public security holders, undertook to reorganize under Chapter XI of the Bankruptcy Act. The S. E. C. sought to intervene, alleging that Chapter X prescribed the exclusive procedure for the reorganization of corporations having securities in the hands of the public. After comparing the procedures prescribed by Chapters X and XI, this Court held that the safeguards provided for public security holders by Chapter X could not be circumvented by the debtor's resort to Chapter XI; in regard to the S. E. C.'s right to intervene, the Court stated (310 U. S. at 458-459):

The Commission is, as we have seen, charged with the performance of important public duties in every case brought under Chapter X, which will be thwarted, to the public injury, if a debtor may secure adjustment of his debts in a Chapter XI proceeding when, upon the applicable prin-

ciples which we have discussed, he should be required to proceed, if at all, under Chapter X. The Commission's duty and its interest extend not only to the performance of its prescribed functions where a petition is filed under Chapter X, but to the prevention, so far as the rules of procedure permit, of interferences with their performance through improper resort to a Chapter XI proceeding in violation of the public policy of the Act which it is the duty of the court to safeguard by relegating respondent to a Chapter X proceeding. The Commission did not here intervene to perform the advisory functions required of it by Chapter X, but to object to an improper exercise of the court's jurisdiction which, if permitted to continue, contrary to the court's own equitable duty in the premises, would defeat the public interests which the Commission was designated to represent.

And in the *West India* case, the Court of Appeals for the Second Circuit ruled that the district court has general "power to issue an injunction in the aid of the [Maritime] Commission * * * [to] * * * preserv[e] the *status quo* until it could determine whether it had statutory jurisdiction, and, if so, how it should act." 170 F. 2d at 778-779.

This conclusion is sound since the normal powers of the courts are available in order that these agencies be able to function effectively in

carrying out Congressional policies. For, as this Court has often admonished, the federal courts are not to treat an administrative agency as an "alien intruder, to be tolerated if must be, but never to be encouraged or aided by the [courts] in the attainment of the common aim." *United States v. Morgan*, 307 U. S. 183, 191; *Hecht Co. v. Bowles*, 321 U. S. 321, 330. Courts and administrative agencies are "collaborative instrumentalities of justice" and "not business rivals." *United States v. Ruzicka*, 329 U. S. 287, 295. In *Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 316 U. S. 4, 15, this Court, in dealing with a related question, sustained the implied and inherent power of reviewing courts to preserve the *status quo* in order "to save the public interest from injury or destruction" during the pendency of an appeal. This was stated to be in accord with "the purpose of Congress to utilize the courts as a means for vindicating the public interest." *United States v. Morgan*, 307 U. S. 183, 190-91; *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134. Courts no less than administrative bodies are agencies of government. Both are instruments for realizing public purposes." Cf. *Addison v. Holly Hill Co.*, 322 U. S. 607, 620-622.

2. The district court improperly refused to exercise this power and to grant the assistance requested by the Commission. We have already

shown that the Commission does have control over dispositions of gas reserves, at least in some circumstances. See *supra*, pp. 21-53. Moreover, the proposed investigation might disclose, as the Commission alleged in its complaint (R. 8), that transfer of the reserves here involved without Commission approval might be inconsistent with the public interest, that such transfer constituted a violation of the Act, and might cause great and irreparable injury to the public served by Panhandle's system. To avoid these consequences, the district court should have granted the injunctive assistance requested. *Sanitary District v. United States*, 266 U. S. 405, 426; *In re Debs*, 158 U. S. 564, 591-592; *Robbins v. United States*, 284 Fed. 39, 46 (C. A. 8); see *Heckman v. United States*, 224 U. S. 413, 438, 442; *United States v. Rickert*, 188 U. S. 432, 444; *United States v. Bell Telephone Co.*, 128 U. S. 315, 367; *United States v. San Jacinto Tin Co.*, 125 U. S. 273, 285..

In addition, the fact that the Commission, a regulatory agency of the Government charged with protecting and acting in the public interest was the plaintiff seeking the injunctive aid of the court serves to emphasize the error below, for "since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Porter v. Warner Co.*, 328 U. S. 395, 398.

In these cases, "the standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief." *Hecht Co. v. Bowles*, 321 U. S. 321, 331; see, also, *Virginian Ry. Co. v. System Federation*, 300 U. S. 515, 552; *Yakus v. United States*, 321 U. S. 414, 440-441 and cases cited.

By applying these principles, the Court of Appeals for the Second Circuit affirmed the granting of the requested injunction in circumstances very similar to those here presented. *West India Fruit & Steamship Co. v. Seatrain Lines, supra*. In that case, an injunction was similarly sought to maintain the *status quo* pending an investigation instituted by the Maritime Commission into whether certain reductions in rates proposed by Seatrain violated the Shipping Act of 1916, as amended. The Second Circuit, in affirming the granting of the injunction, held that the Commission should be permitted to "determine whether it had statutory jurisdiction and if so, how it should act." 170 F. 2d at 779. That court simultaneously refused to follow its earlier decision in *Securities and Exchange Commission v. Long Island Lighting Co.*, 148 F. 2d 252, and in addition distinguished it upon the ground that in that case the court "rested its conclusion on a holding that the SEC unmistakably lacked any possible jurisdiction; on the facts now before us, we are unable so to hold as to the Commission here." 170 F. 2d at 799. Since the Power Commission has jurisdic-

tion over the subject matter of its investigation, the principles embodied in the *West India* case also govern here: Cf. *Oklahoma Press Pub. Co. v. Walling*, 327 U. S. 186; *Endicott Johnson Corp. v. Perkins*, 317 U. S. 501.

C. TITLE TO THE HUGOTON STOCK HAS NOT PASSED TO PANHANDLE'S STOCKHOLDERS AND HENCE ENJOINING DELIVERY OF STOCK CERTIFICATES WOULD INFLICT NO HARDSHIP ON THEM

1. In the court below, intervener stockholders of Panhandle urged in effect that "The Panhandle-Hugoton transaction is a thing done and there is nothing a court can do to stop it" (R. 80). The court below, however, rejected that contention, pointing out "We do not think that the shareholders of Panhandle have fully completed rights to their stock dividends until they get the certificates [which] are now in the hands of the custodian * * *" (R. 80).

This holding is, we submit, sound, for it is clear under the Uniform Stock Transfer Act—which the intervener stockholders urged in the court below is here controlling, a position with which we agree—that title to the stock may be transferred only by delivery of the certificate. This is clear from Section 1 of that Act which provides that "Title to a certificate and to the shares represented thereby can be transferred *only*, (a) By *delivery of the certificate* indorsed either in blank or to a specified person by the

person appearing by the certificate to be owner of the shares represented thereby, or (b) By *delivery of the certificate* and a separate document containing a written assignment * * * .”

This already clear provision is explained by the Commissioners' Note thereto (6 Uniform Laws Ann., p. 2) as follows:

The provisions of this section are in accordance with the existing law (see Cook on Corporations, section 373 et seq.), except that the transfer of the certificate is here made to operate as a transfer of the shares, whereas at common law it is the registry on the books of the company which makes the complete transfer. The reason for the change is in order that the certificate may, to the fullest extent possible, be the representative of the shares. This is the fundamental purpose of the whole act, and is in accordance with the mercantile usage. The transfer on the books of the corporation becomes thus like a record of a deed of real estate under a registry system.

Other provisions of the Act further demonstrate that shares are represented by the certificate and that title to the shares can be transferred only by delivery of the certificate. Thus, if a transferee has possession of the certificate or of a new certificate representing part or the whole of the same shares of stock, Section 8 gives “an indefeasible right to the certificate and the shares

represented thereby" to a subsequent purchaser for value in good faith although the prior transfer has been rescinded or set aside. Section 13 provides that no attachment or levy upon shares for which a certificate is outstanding shall be valid until such certificate is actually seized by the proper officer, or is surrendered to the issuing corporation, or its transfer by the holder is enjoined. And Section 15 forbids any lien in favor of a corporation upon the shares issued by it or any restriction upon the transfer of shares by virtue of any bylaws of the corporation, or otherwise, unless such lien or restriction is stated upon the certificate.²⁸

The Uniform Stock Transfer Act has been so construed by the New Jersey Court of Errors and Appeals, whose interpretation, we submit, governs here.²⁹ *Besson v. Stevens*, 94 N. J. Eq.

²⁸ The provisions of Section 3 are consistent with this view. Although under that Section the corporation is allowed to recognize as owner the person in whose name the stock is registered for the purpose of paying dividends, permitting him to vote, and to hold him liable for calls and assessments, these provisions are uniformly recognized to be primarily for the benefit of the corporation, so that it may act on the basis of the information in its stock books and be protected in such matters without liability to third parties. See Christy, *The Transfer of Stock* (2d ed. 1940), § 31; 12 Fletcher, *Cyc. of Corporations* (Rev. ed. 1932), § 5489.

²⁹ This Act is law both in Delaware, the domicile of Hugoton and Panhandle, and in New Jersey, the place of business of United States Corporation Company. Panhandle's agent for the transfer of the stock. Delaware Rev. Code 1935, §§ 2048 A-2048X; N. J. S. A. 14: 8-23 to 14: 8-46. Although

549; *Paltberg v. Gott*, 102 N. J. Eq. 371. See, also, *Figueres v. Sherrell*, 181 Tenn. 87; *In re Heller's Estate*, 210 Wis. 474. In holding that

Delaware's interest in the transfer of stock issued under its law is, of course, material, it would seem that the law of New Jersey, as the state where the certificate was at the time of the transaction, is controlling. See Restatement, *Conflict of Laws* (1934 ed.), § 53; Christy, *The Transfer of Stock* (2d ed. 1940), § 66; Hing, *Situs of Shares Issued Under the Uniform Stock Transfer Act*, 87 U. of Pa. L. Rev. 700. Even were Delaware law applicable, the interpretation of the New Jersey courts should be applied in the absence of any controlling Delaware decisions. This follows because the New Jersey courts are constraining a Uniform Act, which is also law in Delaware and furthermore because, apart from Delaware, New Jersey's concern with a stock transfer occurring within its own boundaries is clearly paramount to that of any other state. As far as we have been able to discover, there are no Delaware decisions on this question. *Wilmington Trust Co. v. Wilmington Trust Co.*, 15 A. 2d 665 (Del. Ch.), and *Wilmington Trust Co. v. General Motors*, 51 A. 2d 584 (Del. Sup. Ct.), cited below by the stockholder interveners as holding that title may be transferred by transfer on the corporation stock records, do not involve the Uniform Stock Transfer Act. The *Trust Co.* case did not even involve any issue as to transfer of title; it dealt solely with the question whether the estate of a life beneficiary of a trust was entitled to receive a cash dividend paid after the beneficiary's death. The *General Motors* case did involve a problem of transfer of title to stock, but there the certificates involved were issued prior to the passage of the Act, which provides in Section 23 that it applies only to certificates issued after the effective date of the Act. The law then existing in Delaware provided that "the shares of stock in every corporation shall be deemed personal property and transferable on the books of the corporation in such manner and under such regulations as the By-laws provide * * *". Rev. Code (1935) 2048. See 16.

³⁰ Although there are a number of cases involving the transfer of stock after the passage of the Uniform Act, very

the issuance of a new certificate in the name of the transferee without delivery thereof to him was not legally sufficient to pass title to him, the Court of Errors and Appeals stated (94 N. J. Eq. at 565) :

Stock holding has a dual aspect. On the one hand, it involves a contractual relationship between corporate entity and the stockholder, and on the other, it involves the ownership of property—of an interest in the corporate property. Considering the contractual aspect, the dissolution of the contractual relationship between the corporation and the old stockholder is conditioned upon, and is incomplete until, the perfection or completion of the contractual relationship between the corporation and the new stockholder (the transferee), and that is not complete (at any rate, in a case where the transferee has not received from the transferor the assignment of the shares and himself presented it to the company)

few actually construe its provisions. For example, in *Buffalo v. Barnes*, 226 N. C. 313, the court did not mention the Act. In *Peets v. Manhasset Civil Engineers*, 68 N. Y. S. (2d) 338, the court, in holding transfer on the books as sufficient, relied on decisions prior to the Uniform Act without independently examining the Act's effect. The statement in *Bayle v. First Nat. Bank*, 168 Misc. 398, contrary to the construction urged in the text, is *obiter*. For a collection of cases arising before and after the Act, see Notes, 99 A. L. R. 1077, 1085; 152 A. L. R. 427, 431, 435. It should be noted, however, that in most of the cases listed as arising after the Act, certificates issued prior to the Act are involved and the Act is not, therefore, in issue. See, e. g., *Shaw v. Addison*, 28 N. W. 2d 816 (Iowa), and *Simonton v. Dwyer*, 167 Ore. 50.

until the delivery of the new certificate and its acceptance by the transferee. No one can become a stockholder in a company without his knowledge and consent. * * * Considering the matter from the property aspect * * * the transaction is one solely between transferor and transferee. The corporation has no interest in the thing from this standpoint * * *.

Since title to the Hugoton stock can be transferred only by delivery of the certificates to the Panhandle stockholders or to their agent in that behalf and no such delivery occurred, Panhandle's stockholders have not acquired legal title to the stock. Delivery by Panhandle of its block certificate to the United States Corporation Company, the transfer agent for Hugoton, was, of course, not delivery to the Panhandle stockholders or their agent. In receiving the certificate from Panhandle, the United States Corporation Company was acting simply as the agent of Panhandle to accomplish delivery to the transferees and not as agent for the stockholders. Panhandle, not its stockholders, control the Corporation Company's actions. Until the United States Corporation Company makes delivery to Panhandle's stockholders, Panhandle can obtain the certificate back or retransfer it without the consent of its stockholders. See *Southern Industrial Inst. v. Marsh*, 15 F. 2d 347, 349 (C. A. 5), certiorari denied, 273 U. S. 747; *Besson v. Stevens*, 94 N. J. Eq. 549, 566.

The very facts of this situation gainsay the contention of the stockholder interveners that title of the stock has already passed to them. Both the temporary restraining order (R. 23) and the interlocutory stay (R. 81) enjoin only Panhandle and its agents from transferring title to third persons; neither order restrains Panhandle's stockholders from selling the Hugoton stock. Yet notwithstanding the absence of restraint, Panhandle's stockholders have not attempted to transfer title. Instead, some have entered into contracts to sell "when, as and if delivered." However, if, as they contend, title to the shares has been transferred to them by changing the registration of holders in the Hugoton stock records, and if the United States Corporation Company is the agent of the transferee rather than the transferor, they may use the same machinery to transfer title to third parties, without the certificates of stock. The fact that the stockholders have not attempted such transfers illustrates, their contention notwithstanding, that United States Corporation Company is Panhandle's agent in this transaction and that certificates of stock are essential to the transfer of title. Absent the certificate, there has been no transfer of title.

2. The intervener stockholders further urged that they have at least equitable rights to the stock which, they contended, warrant the denial to the Commission of injunctive assistance. But the rights which they assert to the stock have not

accrued to them as the result of a purchase for value in good faith; they have paid nothing for the Hugoton stock. Their position here, as intended recipients of a dividend which Panhandle was not obligated to declare, is somewhat analogous to that of a donee. An injunction would not, and has not, prevented them from selling Hugoton shares over-the-counter on a "when, as, and if" basis.³¹ Over-the-counter transactions do not, as interveners assert, prevent them from realizing cash for the Hugoton shares nor do they create an indefinite risk of the solvency of the purchaser. Risk of insolvency may be guarded against by "marking to the market," i. e., by requiring the buyer to deposit any amount by which the open market price of the "when, as, and if" stock falls below the price which he has contracted to pay. Alternatively, interveners could obtain cash by assigning their over-the-counter contracts. See Loss and Vernon, *When-Issued Securities Trading in Law and Practice*, 54 Yale L. J. 741, 752, 761-762.³²

³¹ We have been informally advised that notwithstanding the interlocutory restraint imposed by the court below, the active over-the-counter trading of the Hugoton stock on a "when, as, and if" basis has continued.

³² The suggestion of the stockholder on behalf of the over-the-counter purchasers that the effect of restraining the delivery of the Hugoton stock would cause hardship to the purchasers also is likewise without merit. The very words "when, as, and if" evidence the fact that participants in such transactions fully realize their contingent nature. Although the over-the-counter sales here involved were "when, as, and if

= In these circumstances, any equitable rights of the stockholder interveners are far outweighed by the countervailing public interest here in maintaining the *status quo* pending the outcome of the Commission's investigation (*supra* pp. 66-68). Moreover, the Commission's investigation may reveal that the Panhandle-Hugoton transaction is illegal. If so, the declaration by Panhandle of the Hugoton stock as a dividend to its stockholders also would be illegal. To undo the transaction after such determination by the Commission, if no injunction is here granted, would result in far greater hardships to the stockholders and those who purchased the stock from them.³³ In any case, it should be remembered

delivered" they are in many respects similar to "when, as, and if issued." The possible frustration of either type of transaction is by definition an inherent element in each. See *In re Civic*, 34 F. 2d 624, 626 (C. A. 2); *Zimmermann v. Timmermann*, 193 N. Y. 486, 493-494; *Sices v. Ungerteider*, 142 Misc. 402; *Loss and Vernon*, *supra*, at 746, 751, 763-766. In addition, the fact that not one of these purchasers has sought to intervene in this proceeding illustrates their recognition that they were without any claim, equitable or otherwise.

³³ The court, we believe, could in those circumstances require that the transaction be undone. The change in legal ownership of the stock would not be irrevocable and would not bar cancellation of the transfer of the gas reserves. As already noted, courts of equity may go much further to give relief in furtherance of the public interest than they are accustomed to go when private interests are involved. "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case." *Hecht Co. v. Bowles*, 321 U. S. 321, 329. In *Continental Insurance Co. v. United States*, 259 U. S. 156, 170-173, this Court declared that the district court, in

that any hardships suffered by Panhandle's stockholders are the consequence of Panhandle's private determination of law after due notice of the Commission's order of October 26, 1948, lawfully instituting an investigation of the facts and circumstances involved in the formation and proposed operation of Hugoton (R. 10). The order of October 26, 1948, served upon Panhandle prior to its delivery of the block certificate of Hugoton shares to the transfer agent, put it on notice that it should not proceed any further to consummate the transaction. Panhandle, however, chose to disregard this notice and proceeded at its own risk to deliver the stock certificate to its transfer agent on October 29. Since it is this delivery which lies at the basis of the stockholders' claims, neither Panhandle, nor its stockholders, are in a position now to urge in opposition to the enforcement of the Commission's orders the matters arising out of this delivery. Cf. *Jones v. Securities and Exchange Commission*, 298 U. S. 1, 15; *United States v. United Mine Workers*, 330 U. S. 258, 292; *Porter v. Lee*, 328 U. S. 246; *Porter v. Dicken*, 328 U. S. 252.

directing the dissolution of the Reading Company as a combination in restraint of trade, could disregard the legal effect of a general mortgage although the bondholders were allegedly innocent of any wrongdoing and were not identified with the management of the Reading Company.

CONCLUSION

For the reasons stated, it is respectfully submitted that the decision below should be reversed, with directions that the injunctive assistance requested by the Commission be granted so that the Commission may proceed with its investigation into whether the Panhandle-Hugoton transaction violated the Natural Gas Act, or any Commission order thereunder.

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